Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CELLSWITCH L.P. *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the District of Columbia Circuit erred in allowing the Federal Communications Commission to deprive Petitioners of fundamental due process by refusing to consider amendments submitted by Petitioners in full accordance with that agency's promulgated procedures for the amendment of RSA cellular applications?

2. Whether the United States Court of Appeals for the District of Columbia erred by failing to give strict scrutiny to both the Federal Communications Commission's interpretation of Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b), and that agency's use of its discriminatory interpretation of the statute to deny Petitioners the opportunity to maintain and prosecute their cellular applications because of the limited participation of resident aliens in those applications?

LIST OF PARTIES

The named parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit were: Cellswitch L.P., Silver Wings 1988 L.P., Delta Cellular Partners, Independent Cellular Systems L.P., Federal Mobile Radio L.P., Moving Phones Partnership L.P., Quadrangle Communications, Eastern Cellular Systems L.P., U.S. RSA Telco Partners L.P., Western Celltel L.P., Cells Company, L.P., Cellular Regional Limited Partnership, Continental Alaska Limited Partnership, 21st Century Telecom L.P., CGSA Telephones L.P., Continental Electronics L.P., and Jefferson Cellular L.P., as petitioners; the Federal Communications Commission, as respondent; and Thomas Domencich, Committee for a Fair Lottery, Romulus Engineering, Inc., James E. Martin, Jr., CSH Cellular, Gilcom Cellular, L.P., PC Cellular, Inc., RSA Cellular Company, Sunde Cellular Communications, Inc., Michael B. Azeez, Excellence II, Larsen Cellular Associates, Elleron Cellular Partners, Percival Vaz, Optima Cellular Partnership, ATT RSA Company, L.P., and Marco Communications Corp., as intervenors.

None of the corporate entities have a parent or subsidiary corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS OF THE COURT AND ADMINISTRATIVE AGENCY BELOW

The Panel opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 30, 1993, affirmed the memorandum opinion and order of the

[1] Petitioners herein are: Cellswitch L.P. ("Cellswitch"); Delta Cellular Partners ("Delta"); Federal Mobile Radio L.P. ("FMR"); Independent Cellular Systems L.P. ("Independent"); and Silver Wings 1988 L.P. ("Silver Wings").

Federal Communications Commission ("FCC") dismissing Petitioners' cellular applications. The Panel's opinion is reported at 998 F.2d 1051 and reproduced in the Appendix at p. 1a. The memorandum opinion and order of the FCC, dated November 20, 1993, is reported at 6 F.C.C.R. 6834 and reproduced in the Appendix at p. 14a, and an erratum thereto, dated December 6, 1993, is reported at 6 F.C.C.R. 7205 and reproduced in the Appendix at p. 35a.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was issued on July 30, 1993. Petitioners, and others, filed timely petitions for rehearing and suggestions for rehearing en banc on September 13, 1993. The orders denying the petitions for rehearing and suggestions for rehearing en banc were entered on October 5, 1993 and are reprinted in the Appendix at pp. 42a-45a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pursuant to Sup. Ct. R. 14.1(f), there are reproduced in the Appendix the texts of the following constitutional provision, statute, and regulations: Fifth Amendment to the Constitution of the United States; Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b); 47 C.F.R. § 1.65(a); 47 C.F.R. § 22.4; 47 C.F.R. § 22.20; 47 C.F.R. § 22.23; 47 C.F.R. § 22.917 (c); 47 C.F.R. § 22.918(a-b); and 47 C.F.R. § 22.923.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The decision of the United States Court of Appeals for the District of Columbia Circuit presents two precise and compelling questions for resolution. The first ques-

tion is whether the court below erred when it allowed the Federal Communications Commission ("FCC") to ignore its own regulations regarding critical elements of the Rural Service Area ("RSA") cellular application process and, thereby, deprive Petitioners of their fundamental due process right to be provided with clear notice of critical application requirements. In the instant proceeding, the court below allowed the FCC to invoke procedures and precedent uniquely applicable to Metropolitan Statistical Area ("MSA") cellular applications when imposing the ultimate sanction of dismissal upon Petitioners' RSA cellular applications. The reliance of the FCC and the court below on MSA standards could have been reached only through concious decisions to ignore the FCC's specific adoption and clear articulation of a significantly different regulatory scheme for the processing of RSA cellular applications. Petitioners, as RSA applicants, were entitled to have their applications evaluated in light of the regulatory scheme which had been promulgated as the specific scheme applicable to their RSA applications.

The second question presented by the instant case is whether the FCC may avoid strict scrutiny by the courts when it effectively makes law, by adopting an expansive interpretation of clear statutory language, which interpretation results in discriminatory treatment of a suspect class. The court below did not subject to critical review the FCC's expansive interpretation of a specific, limited statutory restriction on non-citizen participation in the cellular radio licensing process. Instead of utilizing the strict scrutiny standard appropriate in cases of discriminatory treatment of suspect classes, the court below chose to rely on a rational basis standard to determine that the FCC's discriminatory interpretation merely was not "wholly irrational."

II. BACKGROUND

A. Agency Proceeding

The FCC established the Domestic Public Cellular Radio Telecommunications Service to provide cellular telephone service throughout the United States and its territories. The nation and its territories were divided into 734 cellular markets, of which 306 were Metropolitan Statistical Areas ("MSAs") determined by the Census Bureau and 428 were Rural Service Areas ("RSAs") designated by the FCC. The FCC first conducted the MSA phase of its cellular licensing process, with the RSA phase following. Between the two phases, the FCC substantially modified its cellular application and licensing procedures. As a result of those modifications, RSA applications were governed by a regulatory scheme significantly different from the MSA regulatory scheme. In each cellular market, one set of cellular radio frequencies was reserved for use by existing wireline carriers and another set of frequencies was made available for use by nonwireline applicants. All of Petitioners' applications seek authority to utilize nonwireline frequencies in RSAs.

The FCC solicited applications for authority to construct and operate cellular systems in each of the cellular markets. Applications for a particular market could be filed only during the specified filing window for that market. Applications for RSA markets were filed commencing with the July 13-15, 1988 filing window and ending with the January 11-13, 1989 window. The FCC received several hundred timely applications for the nonwireline authorization in each RSA market. Each Petitioner herein filed separate applications for the nonwireline authorizations in many or all of the RSAs.

After its experiences with comparative hearings involving multiple applicants for each of the first thirty cellular markets, the FCC determined that selection among competing cellular applicants could be conducted most effi-

ciently through a lottery process. Under the FCC's rules applicable to the RSAs, a single applicant was to be selected by lottery from among all applicants filing timely and complete applications for a particular market. The qualifications of the applicant so selected would then be reviewed without comparison to, or even consideration of, any other applicant for that market. Initial lotteries with respect to each of the 428 RSAs were conducted between September 23, 1988 and December 20, 1989. In those initial RSA lotteries, each of the Petitioners was selected as the winner of one RSA.

After conducting the lottery for each RSA, the FCC issued a public notice announcing the winning applicant therein, which notice also directed the winning applicant to take certain steps, including the filing of amendments, to maintain and prosecute its application. Although an RSA applicant is barred by 47 C.F.R. § 22.918(b) from amending its application during the period between the filing of the application and its selection in a lottery, that same regulation provides a post-lottery 30-day period during which an applicant is allowed to amend its winning application. Petitioners Cellswitch, FMR, Independent, and Silver Wings each filed post-lottery minor amendments apprising the FCC that they had modified their respective partnership agreements so as to convert their applicant entities from general partnerships to limited partnerships. Those amendments also converted each non-citizen principal of those Petitioners to the status of limited partner.

After passing a substantive review of its application by the FCC's staff, a lottery-winning RSA applicant was designated a tentative selectee and subjected to a specified period of public comment and opposition. Each of the Petitioners was designated the tentative selectee for its cellular market, and each passed the public notice period without comment or opposition. 47 C.F.R. § 22.918(b) also allows a cellular applicant to file minor amendments

to its application after being announced as a tentative selectee. Petitioner Delta filed a post-tentative selectee minor amendment notifying the FCC of changes in the natures of certain of its partners, which changes had the effect of removing all non-citizen principals from general partner status.

The FCC's staff, acting pursuant to delegated authority, dismissed each of Petitioners' applications as being in violation of 47 U.S.C. § 310(b) and 47 C.F.R. § 22.4 (b).[2] The FCC staff based those dismissals on the contention that the presence of even one alien general partner in an applicant partnership automatically rendered the application unacceptable for filing. In dismissing these applications, however, the FCC's staff refused to consider Petitioners' timely filed amendments, each of which had removed all aliens from general partner status.

Each Petitioner, after the dismissal of its respective application, timely filed a petition seeking FCC staff reconsideration of the action dismissing its application. Those petitions for reconsideration challenged, *inter alia*, the agency's failure to give prior notice of its intent to dismiss as unacceptable for filing any applications including non-citizen general partners at the time of initial filing; the expansive interpretation of 47 U.S.C. § 310(b) relied on in the staff dismissals; and the agency's failure even to consider the timely amendments submitted by the dismissed applicants.

The FCC's staff referred Petitioners' reconsideration petitions, and those of several other similarly situated applicants, to the FCC for review. On November 20, 1991, the FCC issued a consolidated memorandum opinion and order rejecting the challenges to its staff's dismissal actions, and affirming the dismissals of the subject applications.

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[2] 47 U.S.C. § 310(b) and 47 C.F.R. § 22.4 restrict the ability of non-citizens to hold, or participate in, radio licenses, including cellular licenses.

B. Decision Of The Court of Appeals

Each of Petitioners timely filed a notice of appeal on or before December 20, 1991. Petitioners' appeals were consolidated with each other, and with the appeals of several other parties affected by the action of the FCC. Oral argument of the consolidated case was held before a three-judge Panel of the United States Court of Appeals for the District of Columbia Circuit on April 8, 1993. The Panel issued its decision on July 30, 1993. The Panel affirmed the FCC's dismissal of Petitioners' applications.

The Panel was able to reach its decision regarding the acceptability and amendability of Petitioners' RSA applications only by evaluating those RSA applications in light of an inapplicable regulatory scheme governing amendment of MSA applications. In doing so, the Panel totally ignored the fact that, between the MSA and RSA phases of the FCC's cellular licensing proceedings, the agency had adopted and promulgated distinct, fundamentally different application amendment procedures applicable only to ensuing RSA applications, including Petitioners' RSA applications which are the subjects of this case.

In reaching its decision regarding the validity of the FCC's unilateral expansion of 47 U.S.C. § 310(b)'s specific, limited restrictions on the participation of noncitizens in cellular licensees, the Panel chose to utilize a rational basis standard, instead of the appropriate strict scrutiny standard, for its review. Only by determining that the FCC's expansive interpretation was not wholly irrational was the Panel able to justify the FCC's wholesale discrimination against cellular applicants with noncitizen general partners.

Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by Petitioners on September 13, 1993. Those petitions were denied by orders of October 5, 1993.

REASONS FOR ALLOWING THE WRIT

In this case, the Court of Appeals has permitted the Federal Communications Commission ("FCC") both to ignore its own regulations, and to impose upon Petitioners the draconian sanction of application dismissal without clear prior notice of the standards upon which its dismissal actions were based. This radical departure from the accepted and usual requirements of elementary fairness and due process calls for this Court's exercise of its power of supervision. The Court of Appeals also has allowed the FCC to expand upon the clear language of a statute in a manner which discriminates against a suspect class without subjecting that discriminatory expansion to the strict scrutiny mandated by the applicable decisions of this Court.

That an agency is bound by, and must adhere to, its own regulations is a "judicially evolved rule of administrative law" which has been "firmly established" by this Court. *Vitarelli v. Seton,* 359 U.S. 535, 547 (1959). In the instant case, however, the Court of Appeals sanctioned the FCC's refusal even to consider amendments timely submitted by Petitioners in reliance upon a rule allowing the immediate post-lottery filing of RSA cellular applications, which rule had been specifically adopted and clearly promulgated by the FCC as part of its modification of its cellular licensing procedures for the RSA markets. It also is a usual and accepted judicial requirement that the FCC may not impose the sanction of dismissal on an application without prior "explicit notice of all application requirements." *Salzer v. Federal Communications Commission,* 778 F.2d 869, 875 (D.C. Cir. 1985). In this regard, it is generally accepted that the FCC may not invoke as *application acceptability* criteria statutory or regulatory language which merely establishes *license grantability* criteria. *Radio Athens, Inc. (WATH) v. Federal Communications Commission,* 401 F.2d 398, 403 (D.C. Cir. 1968). Despite these require-

ments for clear and explicit notice of application acceptability criteria, the Court of Appeals in this case improperly affirmed the FCC's use of license grant criteria as the basis for the dismissal of Petitioners' applications.

This Court has held that "the federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 104 (1976). For any judicial review of laws or rules discriminatory against resident aliens promulgated by governmental authorities which do not fall within the definition of "political branches of the Federal Government," this Court has mandated a standard of strict scrutiny. *Plyer v. Doe*, 457 U.S. 202, 224-225 (1982). In the instant case, however, the Court of Appeals deliberately chose not to apply the strict scrutiny standard when it reviewed the FCC's discriminatory interpretation of 47 U.S.C. § 310(b).

The failure of the Court of Appeals to apply either the controlling decisions of this Court or the accepted and usual standards of judicial proceedings to its review of the FCC's action warrants the grant of this Petition for Writ of Certiorari.

I. THE COURT OF APPEALS INCORRECTLY DECIDED THAT PETITIONERS' RSA CELLULAR APPLICATIONS COULD NOT BE AMENDED AND IMPROPERLY AFFIRMED THE FEDERAL COMMUNICATIONS COMMISSION'S DISMISSAL OF THOSE APPLICATIONS

A. The Court Of Appeals Improperly Allowed The FCC To Ignore The Agency's Own Rules Governing The Amendment Of RSA Applications

The FCC adopted and promulgated regulations governing amendments to *RSA* applications which were distinct from its provisions governing amendments to *MSA* applications. Petitioners were adversely affected when the

FCC failed to apply the unique RSA amendments provisions to their applications and, instead, wrongly imposed MSA amendment restrictions on Petitioners' RSA applications. The Court of Appeals improperly condoned the FCC's failure to comply with its own rules by either failing to discern or refusing to acknowledge the decisionally significant difference between the FCC's application amendment procedures regarding *MSA* applications and the unique application amendment procedures applicable to *RSA* applications, such as the subject applications of Petitioners.

The Court of Appeals' own description of the regulatory framework governing cellular applications clearly demonstrates that it erroneously accepted the FCC's assertion that RSA applicants were bound by the same restrictions on amendments as had been applicable to MSA applicants. The court below described the amendment rules applicable to Petitioners' applications as follows:

> To speed the selection process, Commission rules prohibit the filing of amendments to cellular applications *until after a qualified tentative selectee has been announced for a particular market. Only tentative selectees may file amendments,* and only minor amendments are permitted. Applicants filing defective applications therefore have *no opportunity* to file amendments either before *or after* the lottery to bring applications into compliance with acceptability criteria should they prevail in the lottery. (emphasis added; citations omitted).[3]

Although this characterization is accurate regarding MSA applications, it cannot be construed to also govern the amendability of RSA applications.

In adopting MSA application procedures, the FCC gave notice that MSA applicants would not have any opportunity to correct application defects and stated:

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[3] 998 F.2d at 1054.

> Under Section 22.918(b), amendments to initial cellular applications *may not be filed until a tentative selectee has been placed on public notice,* and then only by the tentative selectee. Prior to placement on public notice (*and thus prior to the filing of amendments*) the tentative selectee's application will undergo the careful review described above. *Thus, the selectee will not have an opportunity to file curative amendments prior to the extensive staff screening.* Only after passing that screening will amendments be permitted under Section 22.918(b). (emphasis added).[4]

The cited language reveals that any lack of *opportunity* to cure MSA application defects through amendment was merely an outgrowth of the FCC's sequencing of its MSA application procedures.

47 C.F.R. § 22.20(a)(2) allows the FCC to dismiss a cellular application as unacceptable for filing if, upon review, the application is found not to comply with "the [FCC's] rules, regulations, specific requirements for additional information or other requirements." Because *extensive staff screening* of MSA applications occurred prior to the time amendments could be filed, there was no *opportunity* for an MSA applicant to cure initial defects in its application in time to avoid the dismissal of that application as unacceptable for filing.

By contrast, the RSA application processing scheme affords a clear *opportunity* for the filing of amendments at an early stage of that process. When revising its cellular rules in anticipation of the RSA phase of the cellular licensing process, the FCC modified 47 C.F.R. § 22.918(b) to provide for the immediate, post-lottery filing of amendments by RSA applicants, stating:

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[4] ***Amendment of the Commission's Rules to Allow the Selection From Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings,*** **59 Rad. Reg. 2d (P&F) 407, 410, n.17 (1985).**

> We have also examined our existing Rules concerning the timetable for filing amendments pursuant to § 1.65 of the Commission's Rules and *are amending this timetable for RSA applications to require that this information be submitted within 30 days of the notice of lottery results.* (emphasis added).[5]

As a result of the FCC's modification of its cellular processing timetable for RSA applications, 47 C.F.R. § 22.918(b) provides:

> Amendments for applications . . . may not be filed prior to conduct of the lottery for the market applied for. The tentative selectee may file minor amendments, but no major amendments except for those listed in § 22.23(g). Information required by § 1.65 shall be filed within 14 days of publication of the Public Notice announcing the tentative selectee in markets below the top-90 *and within 30 days of the Public Notice announcing the lottery results for all applications to serve Rural Service Areas.* (emphasis added).

As is apparent, the last sentence of 47 C.F.R. § 22.918(b) sets forth significantly different amendment timetables for MSA and RSA applications. An RSA application may be amended immediately after its selection by lottery, while an MSA application, by contrast, must first survive extensive staff screening before reaching the tentative selectee stage which is a pre-condition to the MSA applicant's ability to amend its application. That language also affords an RSA applicant a specific post-lottery, but pre-tentative selectee, opportunity to amend its application.[6]

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[5] *Amendment of the Commission's Rules for Rural Cellular Service*, 60 Rad. Reg. 2d (P&F) 1029, 1038 (1986).

[6] It also is significant that each FCC public notice announcing RSA lottery winning applications directed the named applicants to file "amendments within 30 days of this Public Notice." Those directives clearly ratified the early amendment opportunity afforded RSA applicants by the unambiguous language of 47 C.F.R. § 22.918(b).

As a post-lottery RSA amendment would precede any extensive staff screening, it gave the RSA applicant an *opportunity* to correct application defects through amendment—an *opportunity* simply not available to MSA applicants. Therefore, the substantially different MSA regulatory framework and dismissal precedent relied upon by both the Court of Appeals and the FCC is not relevant to the amendability of Petitioners' RSA applications.[7]

It is significant that the FCC, when adopting and promulgating the early amendment procedures for RSA applications, neither restricted an RSA applicant from using the post-lottery amendment opportunity to correct defects in its application, nor required that an RSA application be found acceptable for filing before it could be amended by post-lottery amendment. Therefore, implicit in the *opportunity* to amend RSA applications pursuant to 47 C.F.R. § 1.65 and 47 C.F.R. § 22.918(b) is the *opportunity* to correct application defects through post-lottery amendment.[8] Neither the FCC nor the Court of

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[7] In determining that cellular applicants do not have any opportunity to amend defective applications, the Court of Appeals relied upon *REM Communication*, 3 F.C.C.R. 3705 (1988). However, *REM* involved an MSA application, and the FCC invoked the MSA amendment prohibition of 47 C.F.R. § 22.918(b) to reject that applicant's post-lottery attempt to correct application defects through amendment. In light of the post-lottery amendment opportunity afforded RSA applicants by 47 C.F.R. § 22.918(b), which opportunity was not available to MSA applicants, *REM* is not a valid precedent in this case.

[8] 47 C.F.R. § 1.65 requires an applicant to amend its application "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects" or "whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application." Accordingly, Petitioners not only were allowed to file the amendments reporting the decisionally significant changes in their structures, but were under an affirmative obligation to do so. Petitioners' amendments were allowable minor amendments, as defined by 47

Appeals can now tell Petitioners that the FCC did not intend for the post-lottery amendment opportunity to be used to correct application defects. "It is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express." *McElroy Electronics Corporation v. Federal Communications Commission*, 990 F.2d 1351, 1366 (D.C. Cir. 1993), *citing L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664 (D.C. Cir. 1982); *Kent Nowlin Construction Co. v. Occupational Safety & Health Review Commission*, 593 F.2d 368 (10th Cir. 1979).

It is well established that an agency is bound by, and must adhere to, its own regulations. *Vitarelli*, 359 U.S. at 547. Having afforded RSA applicants the opportunity for the early amendment of their applications immediately after selection by lottery, the FCC could not refuse to consider amendments timely filed in compliance with, or in reliance on, that provision. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). The Court of Appeals, to the severe detriment of Petitioners, improperly affirmed the FCC's failure to meet its concomitant obligation to give full consideration to amendments filed in compliance with its promulgated rule. This failure of the Court of Appeals warrants the allowance of the writ of certiorari sought by this Petition.

B. The Court Of Appeals Improperly Allowed The FCC To Dismiss Petitioners' Applications As Unacceptable For Filing Without Providing Clear Prior Notice Of The Acceptability Criteria Relied Upon For Those Dismissals

As noted above, Petitioners, as RSA applicants, had the right to amend their applications immediately after being announced as lottery winners. The FCC, alleging

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C.F.R. § 22.23(c)(4), because they reported limited structural changes which did not result in any substantial changes in the beneficial ownership or control (*de jure* or *de facto*) of the Petitioners.

that Petitioners' applications were unacceptable for filing, refused even to consider Petitioners' amendments. It was the FCC's contention that the subject applications were unacceptable for filing because those applications, as originally filed, were not in compliance with the citizenship requirements of either Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b), or 47 C.F.R. § 22.4(b). In light of the position taken by the FCC, it is evident that the FCC was utilizing those statutory and regulatory citizenship requirements as application acceptability for filing criteria. The Court of Appeals erred by affirming the FCC's wrongful reliance on citizenship requirements as application acceptabilty for filing criteria.

It is a firmly established legal principal that all FCC applicants are "entitled to expect rules defining the required content of applications that are reasonably comprehensible to men acting in good faith." [9] Nowhere is this requirement of clear guidance more critical than with regard to application acceptability criteria. When previously faced with the appeal of an FCC applicant whose application had been dismissed for failure to meet alleged acceptability criteria imposed by the FCC, the D.C. Circuit stated:

> The *quid pro quo* for stringent acceptability criteria is *explicit notice of all application requirements:* "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." The less forgiving the FCC's acceptability standard, the more precise its requirements must be.[10] (emphasis added).

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[9] *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 403 (D.C. Cir. 1968).

[10] *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), *citing Radio Athens*, 401 F.2d at p. 404.

In its *Radio Athens* decision, the D.C. Circuit specifically prohibited the FCC from construing statutory or regulatory *license* grantability provisions as *application acceptability* criteria. In holding that applicants are entitled to clear notice as to which of the FCC's myriad rules the agency intends to utilize as application acceptability criteria, that court observed:

> The rule itself does not indicate that an application with a [specified] problem will be dismissed without consideration, but merely advises that a license will not be granted if the [specified] violation perists.[11]

Radio Athens, Salzer, and their progeny clearly stand for the proposition that statutory or regulatory provisions intended by the FCC as application acceptability criteria must be unequivocally articulated as such. In fact, the *Radio Athens* court cited, as an exemplar, an FCC regulation which utilized the phrase "no application will be accepted" as an example of the precision and clarity required in the promulgation of *application acceptability* criteria.

As noted above, cellular citizenship requirements are set forth in 47 U.S.C. § 310(b), and echoed in its regulatory counterpart, 47 C.F.R. § 22.4(b).[12] Section 310 (b) provides only that licenses may not be "granted to or held by" entities exceeding specified levels of alien participation. Nothing in the language of Section 310(b) can be construed as a bar to the *filing* of applications with non-citizen participation in excess of the specified levels. Hence, neither the FCC nor the Court of Appeals could legitimately find that Section 310(b) established any acceptabilty for filing criteria based on citizenship.

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[11] *Radio Athens,* 401 F.2d at 403.

[12] As the statutory and regulatory provisions are virtually identical, they will be collectively referred to herein as "Section 310 (b)."

Petitioners recognize that application acceptability criteria based on citizenship may have been promulgated in statutory or regulatory provisions other than Section 310 (b). For example, the FCC has consistently construed the cellular application content requirements of 47 C.F.R. § 22.923 as application acceptability criteria.[13] An examination of that regulation, however, reveals absolutely no reference to citizenship requirements.[14]

Neither the Court of Appeals nor the FCC has been able to identify any FCC pronouncement precisely specifying citizenship requirements as application acceptability criteria. The Court of Appeals, however, attempted to draw such criteria out of 47 C.F.R. § 22.20(a)(2) in rationalizing the FCC's dismissal of Petitioners' applications. Although that regulation provides "examples of common deficiencies which result in defective applications," it contains no reference to citizenship or alienage. On the basis of its reading of that provision, however, the Court of Appeals concluded that:

> Taken together, the rule governing acceptability, 47 C.F.R. § 22.20(a)(2), and the rule governing the acceptance of amendments to applications, 47 C.F.R.

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[13] *Progressive Cellular III B-2*, 5 F.C.C.R. 2772 (1990) (RSA applicant dismissed for failure to properly demonstrate its financial qualifications as required by 47 C.F.R. § 22.923(a)(7)).

[14] The lack of any reference in 47 C.F.R. § 22.923 to citizenship or alienage stands in sharp contrast to that provision's requirement of a financial exhibit demonstrating, *inter alia*, "how the applicant intends to finance construction." The regulation's specific instruction to "See § 22.917" gives a prospective applicant clear notice of precise financial requirements. Further, by following up on the referral to 47 C.F.R. § 22.917, an RSA applicant can readily ascertain exactly how to meet the FCC's financial application acceptability criteria. That rule also gives clear notice that an applicant must comply with the financial criteria "at the time it files its application." The clarity with which these rules articulate financial requirements as application acceptability criteria demonstrates that the FCC is fully aware of its obligation to alert applicants to application acceptability criteria.

> § 22.918(b), alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications.[15]

The Court of Appeals' premises and conclusions reflected in this statement are wrong.[16] *Salzer* does not allow 47 C.F.R. § 22.20(a)(2) to be read to construe Section 310(b) as a critical filing requirement, or to set filing dates as the deadlines for compliance of substantive qualifications. In fact, when 47 C.F.R. § 22.20(a)(2) and the RSA amendment provisions of 47 C.F.R. § 22.918(b) are "taken together", as urged by the Court of Appeals, they provide applicants with the prospect of being able to amend any defects in their applications prior to any review which may lead to dismissal on substantive grounds. In addition, the holding in *Radio Athens* prohibits construing the "grant" language of Section 310(b) as "acceptability for filing" criteria.

The case law extant prior to the filing of Petitioners' applications also is devoid of any notice that the citizenship requirements of Section 310(b) constituted an "application acceptability" criterion. The FCC's staff, in dismissing an application which had not been timely amended, noted that "aliens are not prohibited by Section 310(b) from applying for licenses, only from 'holding' them."[17] The FCC's Review Board, characterizing the citizenship provisions as "prospective and remedial rather than retrospective and/or punitive," allowed an applicant

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[15] 998 F.2d at 1057.

[16] Any analysis by the Court of Appeals involving 47 C.F.R. § 22.918(b) is vitiated by that court's repeated failure to discern the decisionally significant difference between the MSA amendment procedures and the RSA amendment procedures set forth in that regulation. *See, also*, pp. 9-14, *supra*.

[17] *In Re Application of Nevada Broadcasting Group*, No. BPCT-850725K0, 1986 Lexis 3215 at *4 (MMB, June 19, 1986).

to demonstrate its citizenship qualifications by a post-filing amendment of its ownership structure.[18] The FCC characterized citizenship restrictions as "grant" requirements and allowed an originally non-complying applicant to take the "remedial action" of amending its ownership structure.[19] Even the D.C. Circuit had affirmed an FCC decision allowing compliance with citizenship qualifications by post-filing amendment.[20]

Prior to the filing of RSA applications, the only FCC pronouncements regarding alien participation in cellular applications were FCC staff decisions in two MSA cases. *Advanced Business Communications, Inc.*, 2 F.C.C.R. 580, 2 F.C.C.R. 3751 (1987); *GTRW Partnership*, 2 F.C.C.R. 4160 (1987). In *Advanced*, an MSA application initially was dismissed as unacceptable for filing because an initial staff review revealed the presence of an alien corporate officer. After the filing of a post-dismissal amendment, the application was reinstated and granted with the explanation that the initial dismissal had occurred only becaue "no correcting amendment was received by the Commission prior to the time the application was reached for processing by the staff." *Advanced*, 2 F.C.C.R. at 3751. In light of the result in that case, and considering that it was decided in light of the *MSA* provisions of 47 C.F.R. § 22.918(b), Advanced gave RSA applicants no notice that citizenship was an application acceptability criterion.

In *GTRW*, the applicant was a general partnership, with alien general partners, at the time it filed its MSA

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[18] *Seven Hills Television Co.*, 2 F.C.C.R. 3882, 3882 (Rev. Bd. 1987).

[19] *Spanish International Communications Corporation*, 2 F.C.C.R. 3336, 3339 (1987). The FCC also noted that it would enforce citizenship requirements with an eye toward "ensuring future compliance with the statute" rather than imposing sanctions for non-compliance.

[20] *Telemundo, Inc. v. Federal Communications Commission*, 802 F.2d 513, 518 (D.C. Cir. 1986).

application. After the applicant filed a post-lottery amendment converting itself to a limited partnership, and its alien participants to limited partners, the application was granted. Although the FCC recently has repudiated *GTRW*, that repudiation does not change the fact that *GTRW* gave prospective cellular applicants, such as Petitioners, a clear signal that citizenship requirements were not application acceptability criteria and, therefore, could be corrected by post-filing amendment.

It is clear that the accepted and usual course of judicial review, as articulated in the *Radio Athens* and *Salzer* line of cases, requires scrutiny of the criteria used by the FCC as the basis for its dismissal of an application. A reviewing court must determine whether the dismissed applicant was afforded clear and precise prior notice of the alleged application acceptability for filing criteria supporting the dismissal. Even though the Court of Appeals in this case did not subject the FCC to critical examination, any review of the applicable statutes, regulations and case law reveals that the FCC failed to meet the most fundamental requirement of fairness; proper notice of its intent to apply citizenship as an application acceptability criterion.

Contrary to what the Court of Appeals concluded, Petitioners' applications were not unacceptable for filing. Therefore, Petitioners were entitled to file, and have considered, their post-lottery amendments demonstrating their citizenship qualifications.

II. THE COURT OF APPEALS ERRED BY NOT REVIEWING THE FCC'S POLICY DISCRIMINATING AGAINST ALIEN GENERAL PARTNERS UNDER A STRICT SCRUTINY STANDARD

Section 310(b) sets forth specific limitations on the participation of non-citizens in radio licenses, including cellular licenses. Because that statute is silent as to any participation by aliens in general partnership licensees, the FCC took it upon itself to adopt, by declaratory ruling,

a total prohibition on alien general partners. *Wilner & Scheiner*, 103 F.C.C.2d 511 (1985), *reconsidered in part*, 1 F.C.C.R. 12 (1986). But for this FCC-created prohibition on alien general partners, there would be no question as to Petitioners' qualifications to be cellular licensees.

It cannot be denied that the FCC's total prohibition on alien general partners is more restrictive than the congressionally enacted statutory provision governing alien participation in radio licenses. The statutory provision specifically limits only alien participation in corporate licensees, and is silent as to the participation of aliens in general partnership licensees. The FCC, by contrast, extends the discrimination beyond corporations into general partnerships. The statutory provision allows aliens to hold up to twenty percent of the ownership interest in a licensee entity, while the FCC bars aliens from any ownership participation in a general partnership licensee. Certainly, the FCC has gone beyond the clear language of the statute and established discriminatory legal constraints on aliens, including resident aliens, where none existed before.[21]

In the instant case, Petitioners have repeatedly challenged the FCC's total prohibition on alien general partners as an unwarranted denial of equal protection as guaranteed by the due process clause of the Fifth Amendment. In the course of their challenges, Petitioners have consistently sought to have the FCC's policy against alien general partners reviewed under a strict scrutiny standard. However, the Court of Appeals, like the FCC, wrong-

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[21] Section 310(b) does prohibit aliens from being officers or directors of corporate licensees. The FCC decided to totally prohibit alien general partners on the novel theory that general partners are the functional equivalents of corporate officers and directors. When choosing the route of total prohibition, the FCC rejected less restrictive options (*e.g.*, contractual limitations on alien participation in partnership management), which would have been more consistent with the statute's accommodation of limited participation by aliens in licensee corporations.

fully refused to apply a strict scrutiny standard to its review of this issue.

It is not without significance that all of the non-citizens associated with Petitioners' applications are resident aliens.[22] This Court has ruled that aliens should be accorded rights on a "generous and ascending" scale as they increase their identify with our society. *Johnson v. Eisentrager,* 339 U.S. 763, 770-71 (1950). Resident aliens, who have the closest ties with our society, are always a "suspect class" for differential treatment under laws applicable to the general public. *Plyler v. Doe,* 457 U.S. at 216, n.14.

While enactments of the Congress and other "political branches of the Federal Government" are given substantial weight by the courts when measuring such decisions against aliens' claims of denial of equal protection, the states are given no deference in such regard. *Plyler v. Doe,* 457 U.S. at 224. Even the "federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." *Hampton v. Mow Sun Wong, supra,* 426 U.S. at 104. As an independent regulatory agency, the FCC is neither part of the legislature, nor part of the political branch directed by the President. Accordingly, the FCC is not one of the "political branches of the Federal Government" and, therefore, any of its rules, policies or actions which discriminate against aliens, and especially resident aliens, must be subjected to a standard of strict scrutiny upon judicial review.

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[22] "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths,* 413 U.S. 717, 719 (1973). "[F]or most legislative purposes there simply are no meaningful differences between resident aliens and citizens, see *Ambach v. Norwick,* 441 U.S. 68, 75 (1979), so that aliens and citizens are 'persons similarly circumstanced' who must 'be treated alike.' *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)." *Toll v. Moreno,* 458 U.S. 1, 20 (1982).

Had the Court of Appeals properly subjected the FCC's prohibition on alien general partners to the strict scrutiny standard, the prohibition could not have survived. Under the strict scrutiny standard, " 'inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.' *Examining Board v. Flores de Otero,* 426 U.S., at 605." *Nyquist v. Mauclet,* 432 U.S. 1, 7 (1977). "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter,* 467 U.S. 216, 219 (1984).

The FCC policy prohibiting general partnerships with any element of alien participation is unnecessary, overbroad and not the least restrictive means available to achieve the FCC's asserted purpose. The FCC has not articulated any reason as to why its broad disqualification of general partners is necessary to serve a claimed national security interest. Instead, the FCC has asserted, albeit inaccurately, that Section 310(b) left the agency with no choice but to impose a total prohibition on alien participation in general partnerships. *Wilner & Scheiner,* 1 F.C.C.R. at 14.

The Court of Appeals acted in a manner contrary to the applicable decisions of this Court when it deliberately refused to apply the strict scrutiny standard in its review of the FCC's discriminatory prohibition on alien general partners.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 3, 1994

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 8, 1993 Decided July 30, 1993

No. 91-1611

MOVING PHONES PARTNERSHIP L.P.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

THOMAS DOMENCICH AND COMMITTEE
FOR A FAIR LOTTERY
ROMULUS ENGINEERING, INC.
JAMES E. MARTIN, JR.
CSH CELLULAR
GILCOM CELLULAR, L.P.
PC CELLULAR, INC.
RSA CELLULAR COMPANY
SUNDE CELLULAR COMMUNICATIONS, INC.,
Intervenors

AND CONSOLIDATED CASES 91-1613, 91-1614, 91-1615, 91-1616, 91-1617, 91-1621, 91-1626, 91-1627, 91-1628, 91-1629, AND 91-1636

Appeals from an Order of the
Federal Communications Commission

A. Thomas Carroccio argued the cause for appellants. With him on the joint brief were *J. Laurent Scharff, Gertrude J. White, Michael F. Morrone, Mark F. Evens,*

Michael R. Bennet, Richard O. Wolf, Edward R. Kump, Denise Moline, and *Lloyd D. Young. Glen Franklin Koontz* also entered an appearance for appellants in Nos. 91-1611, 91-1613, 91-1614, 91-1615, and 91-1616.

Sue Ann Kanter, Counsel, Federal Communications Commission, argued the cause for appellee. On the brief were *Renee Licht,* General Counsel; *Daniel M. Armstrong,* Associate General Counsel; and *Roberta L. Cook,* Counsel, Federal Communications Commission. *John E. Ingle* and *Robert L. Pettit,* Counsel, Federal Communications Commission, also entered appearances for appellee.

Mark D. Schneider argued the cause for intervenors Thomas Domencich and Committee for a Fair Lottery; James E. Martin, Jr.; CSH Cellular; Gilcom Cellular, L.P.; PC Cellular, Inc.; RSA Cellular Company; Michael B. Azeez; Excellence II; Elleron Cellular Corp.; Percival Vaz; Larsen Cellular Associates; ATT R S A Company, L.P.; Marco Communications Corp.; and Sunde Cellular Communications, Inc. With him on the joint brief were *Carter G. Phillips, Carl W. Northrop, Stephen Kaffee, Kenneth E. Hardman, Benito Gaguine, Arthur V. Belendiuk, Thomas Gutierrez, Eliot J. Greenwald, David J. Kaufman, Thomas L. Siebert,* and *Paul C. Besozzi. George L. Lyon, Jr.* entered an appearance for intervenor Gilcom Cellular, L.P. *Michael D. Sullivan* entered an appearance for intervenor Romulus Engineering, Inc. *Richard S. Myers* entered an appearance for intervenor Optima Cellular Partnership. *Stephen E. Coran* entered an appearance for intervenor Excellence II.

Before MIKVA, *Chief Judge,* and SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Appellants, all partnerships, applied to the Federal Communications Commission ("Commission" or "FCC") for authorization to construct

and operate cellular systems. The FCC dismissed the applications on the ground that each proposed to include one or more alien general partners, violating alien ownership restrictions in the Communications Act ("Act"), 47 U.S.C. § 310(b) (1991 Supp.), and the FCC's rules. Because the Commission reasonably interpreted the Act as prohibiting the grant of a radio license to a partnership with aliens among its general partners, and because the dismissal of appellants' applications was reasonable and consistent with the FCC's strict rules for processing cellular applications, we affirm the Commission's decision.

I.

A. *Regulatory Framework*

In 1981, the Commission adopted rules to govern commercial implementation of cellular telephone service, 47 C.F.R. § 22 subpart K (1993). In doing so, the FCC divided the spectrum into two frequency blocks, for "wireline carriers" (telephone companies) and "nonwireline carriers" (applicants other than telephone companies), to allow two cellular carriers to be licensed in each market area. Confronting a growing demand for cellular service, the FCC solicited applications for nonwireline cellular systems in each designated market and adopted expedited application filing and processing rules designed to minimize the administrative burden on its staff and to permit orderly processing of thousands of cellular applications. *See, e.g., Cellular Communication Systems,* 86 F.C.C.2d 469, 498-501 (1981), *modified,* 89 F.C.C.2d 58 (1982), *further modified,* 90 F.C.C.2d 571 (1982), *petition for review dismissed, United States v. FCC,* No. 82-1526 (D.C. Cir. 1984).

After experiencing significant delays in its expedited comparative hearing process, the Commission decided that selection among competing applications could be conducted most efficiently through lottery in all markets be-

yond the largest thirty.[1] Under the current procedures, the FCC includes in the lottery all applications that facially comply with processing requirements and contain a certification that the application is complete and contains all information required by the application form and the FCC's cellular rules. *Lottery Further Reconsideration Order,* 59 Rad. Reg. 2d (P & F) 407, 410 & n.16. The FCC applies a "letter-perfect" standard to the pre-lottery requirements. Applications not complying with the initial requirements are dismissed and lose any further opportunity to be considered in the lottery. *Id.*

The Commission's staff reviews only the application selected by lottery to ensure that it is acceptable for filing —that is, that it complies with FCC rules, regulations, and other requirements. 47 C.F.R. § 22.20(a)(2). If the application does not meet the standards for acceptability, it is dismissed without further consideration. If, however, it is acceptable, it is placed on public notice as the tentative selectee, offering unsuccessful applicants the opportunity to challenge the application. *Lottery Further Reconsideration Order,* 59 Rad. Reg. 2d (P & F) at 410.

To speed the selection process, Commission rules prohibit the filing of amendments to cellular applications until after a qualified tentative selectee has been announced for a particular market. Only tentative selectees may file amendments, and only minor amendments are permitted. *Cellular Lottery Order,* 98 F.C.C.2d at 220; 47 C.F.R. § 22.918(b). Applicants filing defective applications therefore have no opportunity to file amendments either before or after the lottery to bring applications into compliance with acceptability criteria should they prevail in the lottery. *Lottery Further Reconsideration Order,* 59

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[1] *Cellular Lottery Order,* 98 F.C.C.2d 175, 179 (1984), *recon.,* 101 F.C.C.2d 577 (1985), *further recon.,* 59 Rad. Reg. 2d (P & F) 407 (1985) (*Lottery Further Reconsideration Order*), *aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC,* 815 F.2d 1551 (D.C. Cir. 1987).

Rad. Reg. 2d (P & F) at 410 n.17; *see also, e.g., REM Communication,* 3 F.C.C.R. 3705 (1986).

In the consolidated appeals before us, appellants, seventeen disappointed cellular applicants, challenge the FCC's decisions dismissing their applications upon discovery that each proposed to operate its licensed radio common carrier facility with one or more general partners who were aliens. The Commission held that the applications violated section 310(b)(3) of the Communications Act, prohibiting the grant of radio licenses to aliens and to corporations having a certain level of alien ownership or having aliens as officers or directors. 47 U.S.C. § 310(b)(3) (1988), incorporated in section 22.4 of the FCC's rules. 47 C.F.R. § 22.4(b)(3) (1993).

B. *Proceedings Below*

In the earliest of these proceedings, Continental Cellular, appellant in case No. 91-1621, applied for a cellular radio facility on the nonwireline frequency to service the Alaska 2 (Bethal) Rural Services Area ("RSA"), on July 15, 1988. Like all the appellants, Continental certified that it had complied with the requirements of section 310(b) of the Communications Act and section 22.4(b) of the Commission's rules. Its application was selected in the lottery. *See* PN REP. No. CL-88-168 (F.C.C. released Sept. 27, 1988). The Commission's Mobil Services Division Staff examined Continental's application and rejected it as unacceptable for filing because Continental had proposed to operate as a general partnership with at least three alien general partners in violation of section 310(b)(3) of the Act and section 22.4(b)(3) of the FCC rules. The Commission denied reconsideration of the dismissal, holding that the staff had properly concluded that the inclusion of aliens as general partners violated the prohibitions of section 310(b)(3). The FCC also rejected Continental's argument that alien general partners could exempt themselves from the statutory restrictions by

accepting a partnership agreement purporting to insulate them from the management of partnership affairs, and concluded that even if such an exemption were permissible, Continental's partnership agreement was insufficient to establish such insulation. *Continental Cellular I*, 5 F.C.C.R. at 691-92.

With its petition for reconsideration, Continental submitted an amendment seeking to change its general partnership with the alien partners becoming limited partners. The Commission held that Continental's application could not be amended to comply with alien ownership rules, as it had properly been found defective and unacceptable for filing. 5 F.C.C.R. at 693 n.9, (citing 47 C.F.R. § 22.918(b) and *REM Communication*, 3 F.C.C.R. 3705). Continental appealed the FCC's order to this court, which remanded the case to the Commission for further consideration of the record at FCC's request.

In the interim, each of the other appellants was named the tentative selectee for a market in which it had won the lottery. Each, however, had filed as a general partnership, including between one and four alien partners. Following the lotteries, each sought to file a curative amendment to change its general partnership to a limited partnership or to remove the alien general partners.[2] As it had with regard to the Continental application, the staff dismissed the other applications as ineligible for

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[2] Unlike the other appellants, Quadrangle Communications did not convert to a limited partnership because its only alien general partner died after its original application application had been filed. Instead, Quadrangle amended its application to reflect the fact of the partner's death, and requested a waiver of section 22.922 of the Commission's rules, 47 C.F.R. § 22.922, to permit an involuntary transfer of the deceased partner's interest to the non-alien executrix of the partner's estate. Though the FCC subsequently remanded Quadrangle's application, because Quadrangle, like the other appellants, failed to conform with the Commission's "letter-perfect" cellular application processing rules and procedures, we vacate the remand and deny Quadrangle's appeal.

filing, because they had proposed ownership structures that did not comply with the requirements of section 310(b)(3) and section 22.4(b)(3) of the FCC's rules.

Continental and the other appellants petitioned for reconsideration. The Commission consolidated their cases with Continental's. *Continental Cellular II*, 6 F.C.C.R. 6834, 6835 (1991). The FCC refused to reconsider the dismissals, holding that appellants' applications properly were dismissed as unacceptable for filing. It ruled that the inclusion of aliens as general partners as originally proposed violated section 310(b)(3), whether or not alien general partners purported to insulate themselves from management of partnership affairs, and that even were such a statutory exemption permissible, none of the applicants had made a showing of such insulation. Likewise, the Commission rejected contentions of some appellants that dismissal of the applications denied them their Fifth Amendment right to equal protection regardless of alienage. Finally, the FCC declined to accept amendmendments curing the violation of section 310(b)(3), holding that under clear Commission rules and precedent, curative amendments may not be submitted for a defective cellular application. 6 F.C.C.R. at 6836, (citing *Progressive Cellular III B-2*, 5 F.C.C.R. 2772 (1990)); *REM Communication*, 3 F.C.C.R. 3705 (1988).

II.

Section 310(b) prohibits the grant of radio licenses, including licenses in the common carrier service, to aliens and to corporations evidencing specific levels of alien ownership or control. Section 310(b)(3) forbids the grant of a radio license to any corporation in which an officer or director is an alien, or of which more than twenty percent of the stock is owned or voted by aliens. The Commission adopted the statutory language verbatim in its rules governing mobile radio services, including the cellular service. 47 C.F.R. § 22.4. These alien ownership

restrictions reflect a long-standing determination to "safeguard the United States from foreign influence" in broadcasting. *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P & F) 1057, 1093 (1952). This policy against allowing aliens to have any controlling influence in a licensee was established long before the applications at issue were filed. No less well established in the tenet of partnership law that a general partner has control of partnership affairs as against the outside world. Section 9(1), Uniform Partnership Act; *Picone v. Comm'l Paste Co.*, 60 So.2d 590 (1952). Although the language of section 310(b) and the corresponding rule refers to corporations only, the statutory restrictions have been extended to noncorporate entities and associations. In *Wilner and Scheiner*, 103 F.C.C.2d 511 (1985), *recon. in part*, 1 F.C.C.R. 12 (1986) (*"Wilner & Scheiner Reconsideration Order"*), the FCC applied the alien ownership restrictions of section 310(b) to limited partnerships and other types of partnership and corporate interests. In that decision, the FCC held that for purposes of section 310(b), the position occupied by general partners in a partnership is directly comparable to that of officers and directors in a corporation, *see* 103 F.C.C.2d at 520 n.3; therefore, alien general partners are in a position to exercise foreign influence in broadcast media, in contravention of the national security policy underlying the statute.

Although broadcast radio stations were the dominant medium when the national security policy underlying section 310(b) was developed, the rationale is equally applicable to common carrier radio stations, as they, also, are part of the nation's communications network. Despite their concession that "the national security purpose of Section 310(b) can be a legitimate reason for discrimination against aliens," Pet. Br. at 37, appellants assert a constitutional claim that this court should extend a strict standard of review to distinctions based on alienage. We disagree.

Supreme Court precedent instructs that classifications based in alienage in federal statutes are permissible so long as the challenged statute is not a "wholly irrational" means of effectuating a legitimate government purpose. *Matthews v. Diaz*, 426 U.S. 67, 83 (1976). In *Matthews*, the Court unanimously upheld denial of Medicare benefits to certain aliens. Similarly, in *Foley v. Connelie*, 435 U.S. 291 (1978), the Court held that a state statute limiting membership in the state police force to U.S. citizens did not violate the Equal Protection Clause of the Fourteenth Amendment. In upholding the legislation, the Court made clear that it had "never suggested that [legislation imposing restraints on aliens] is inherently invalid, nor have we held that all limitations on aliens are suspect." *Id.* at 294. Instead, the Court explained, the application of strict scrutiny to the exclusion of aliens as a class has been limited to "exclusions [which] struck at the noncitizens' ability to exist in the community" by denying them essential welfare assistance, educational benefits, or the right to engage in public employment or the practice of licensed professions. *Id.* at 295.[3] The

[3] We note that *Foley* involves state, rather than federal, regulation of aliens. Even so, for the purpose of this case, that fact represents a distinction without a difference. The denial of Medicare benefits which survived the rational basis test in *Matthews* could well withstand the *Foley* analysis, which applied strict scrutiny to "exclusions [which] struck at the noncitizens' ability to exist in the community," 435 U.S. at 295, based on the Court's conclusion such exclusions were "inconsistent with the congressional determination to admit the alien to permanent residence." *Id.* In fact, the facets of community life from which aliens may not be excluded, including eligibility for public employment, educational benefits, or "welfare assistance essential to life itself," are those that, if withheld, would directly cause economic dependence or physical harm. In contrast, receipt of Medicare benefits, while desirable, might legitimately be considered a perquisite of citizenship, insofar as a government's decision not to extend such benefits to aliens does not necessarily involve withholding of essential welfare assistance, as would, for example, the denial of food stamps or emergency services at a hospital.

opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community. Therefore, we apply a rational basis, not a strict scrutiny test.

The national security policy satisfies the requirement that there be a "showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.* at 296. We thus deny appellants' constitutional claim.

Appellants next turn to statutory claims. In analyzing their arguments, we use the framework of inquiry laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984). "If the intent of Congress is clear, that is the end of the matter. . . . [If], [however], the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Appellants first argue that the Commission's practices deviate from the plain meaning of section 310(b). They assert that because the statute specifically bars aliens from "holding" licenses, the statute permits aliens to *apply* for them. Thus, they argue, in dismissing their applications, the FCC improperly interpreted and relied on section 310(b) of the Communications Act. Appellants' attempted plain meaning argument rests on a *non sequitur.* The statute's prohibition on aliens holding licenses cannot sensibly be construed to plainly, or even likely, grant permission for aliens to file license applications. It would avail appellants little to have the right to file a licensing application when they could not, because of their composition, hold a license were it awarded to them.

Nor can appellants credibly claim to have been unfairly surprised by the FCC interpreting the presence of alien general partners in their organization as violations of section 310(b)(3); *Wilner and Scheiner* extended the

Communications Act's prohibition of the grant of broadcast licenses to corporations with aliens serving as officers or directors to partnerships with aliens serving as general partners.

In light of the foregoing, it is clear that a ban on alien ownership exists; what is lacking is a clear direction from Congress as to the point at which the FCC will effectuate the ban. Under the second step of *Chevron,* that decision belongs to the agency provided only that its interpretation is a reasonable one, consistent with the statute. Here, it is clear that the Commission's regulatory scheme is entirely consistent with the congressional mandate embodied in section 310(b), as tested by the *Chevron* analysis.

The FCC intended the cellular lottery process as a quick, simple method for selecting prospective licensees. *See Cellular Lottery Order,* 98 F.C.C.2d at 179-82, 219-22; *Cellular Lottery Further Reconsideration,* 59 Rad. Reg. 2d (P & F) at 409. Under these cellular application processing rules and procedures, the Commission properly concluded that an application that does not comply with all the rules and requirements, including both procedural and substantive requirements relating to the filing and content of the application, must be dismissed.

The procedures set out by the Commission indicate that compliance was an important element in the FCC's decision to announce a successful applicant as the tentative selectee. *See* 47 C.F.R. § 22.20(a); *Cellular Lottery Order,* 98 F.C.C.2d at 195. In amending section 22.918 (b) to "strictly limit[ ] the filing of amendments to applications . . . under lottery selection procedures," *id.* at 220, the Commission barred subsequent amendments throughout the application process, and limited subsequent amendments to those intended to correct minor errors or omissions in otherwise qualified applications. Prior Commission decisions support this interpretation. *See, e.g., REM Communication,* 3 F.C.C.R. 3705; *Progressive Cel-*

lular III B-2, 5 F.C.C.R. 2772, 2773 (1990). Indeed, appellants present no evidence suggesting that the Commission ever has allowed applicants to file amendments to establish their basic qualifications to become licensees.

Nor can appellants prevail by arguing that the FCC offered insufficient notice that applications violating section 310(b) of the Act and section 22.4 of the FCC rules were unsuitable for filing and would be dismissed. Taken together, the rule governing acceptability, 47 C.F.R. § 22.20(a)(2), and the rule governing acceptance of amendments to applications, 47 C.F.R. § 22.918(b), alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications. This notice was all that was necessary.

Thus, there is no support for appellants' contention that the Commission erred in not exempting from section 310(b)(3) partnerships in which alien general partners contractually relinquish control and management. Aside from the deviation from the "letter-perfect" rule that such an exception would entail, appellants have failed to show that the FCC was unreasonable in concluding that it had no power to accord an exemption to individuals holding positions otherwise subject to section 310(b) simply because they agree not to exercise the power of their positions. *Continental Cellular I*, 5 F.C.C.R. at 692; *Continental Cellular II*, 6 F.C.C.R. at 6836; *Wilner and Scheiner Reconsideration Order*, 1 F.C.C.R. at 14-15. Appellants cannot successfully defend their contention that they effectively cured hte violation simply by ensuring that the alien partners could not control the partnership. Even as a practical matter, though the proffered partnership agreements vested day-to-day control in a single managing partner, they neither excluded alien general partners from involvement in the management or

operation of the partnership, nor precluded an alien from holding the position of managing partner. In these circumstances, the FCC could reasonably conclude that the proposed agreements were insufficient to remove the alien general partners from the restriction of section 310(b)(3), even assuming such an exemption were available. *Continental Cellular II*, 6 F.C.C.R. at 6836.

When Congress has intended to give the Commission discretion to depart from a specified level of control in section 310(b), it has spoken explicitly. *See* 47 U.S.C. § 310(b)(4). The absence of such plain language here only supports the FCC's interpretation.

CONCLUSION

The FCC's rules and regulations for selection of cellular licensees made clear that all applications had to qualify for selection before any amendments would be allowed. Because each appellant before us listed an alien as a general partner in the first instance, in violation of the Commission's rules implementing section 310(b) of the Communications Act, their applications did not qualify for selection on the date of filing and therefore could not be awarded. The Commission was well within its authority to dismiss the applications, and we therefore affirm its order.

It is so ordered.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. 10003-CL-P-316-A-88

IN RE APPLICATION OF: CONTINENTAL CELLULAR

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel).

and

File Nos. 10109-CL-P-675-A-88, 10311-CL-P-403-A-88, 10621-CL-P-366-A-89, 10513-CL-P-460-A-89, 10226-CL-P-423-A-88, 10625-CL-P-370-A-89, 10511-CL-P-458-A-89, 10104-CL-P-545-A-88, 10613-CL-P-313-A-89, 10504-CL-P-440-A-89, 10038-CL-P-319-A-88, 10049-CL-P-699-A-88, 10449-CL-P-509-A-89, 10265-CL-P-488-A-88, 10407-CL-P-659-A-88, 10420-CL-P-672-A-89, 10083-CL-P-611-A-88, 10174-CL-P-634-A-88, 10230-CL-P-427-A-88,

IN RE: NINETEEN RURAL SERVICE AREA APPLICATIONS FILED BY PARTNERSHIPS WITH ALIEN PARTNERS

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1991;

Released: November 20, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it a proceeding involving alien ownership of a Commission cellular applicant remanded from the U.S. Court of Appeals for the District of Columbia Circuit at the Commission's request, for further consideration and refinement of the record.[1] Continental Cellular (Continental)[2] filed its application as a general partnership. One of the general partners was a non-United States citizen.[3]

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[1] On April 24, 1990, Thomas Domencich and the Committee for a Fair Lottery filed a Motion to consolidate this proceeding with 22 other proceedings also involving alien ownership. On November 28, 1990, various counsel representing 17 of the applicants dismissed in those other proceedings also requested we consider the records in those proceedings with the one at bar, and requested the opportunity to present oral argument.

[2] Continental Cellular has, since originally filing it application, altered its ownership structure. Continental's successor in interest is Continental Alaska Limited Partnership.

[3] The record in this proceeding includes: (1) a Petition for Reconsideration filed by Continental on November 30, 1988; (2) Comments of Romulus Engineering filed February 13, 1989; (3) Comments on the Participation of Non-Citizen Principals in Cellular Applications filed by various legal counsel representing cellular applicants on November 3, 1989); (4) Furthur Comments on the Participation of Non-Citizen Principals in Cellular Applications filed by other legal counsel representing a cellular applicant on January 3, 1990; (5) Supplementary Comments of Continental filed November 28, 1990; (6) various related pleadings. As the issues raised by Continental, the applicants which were general partnerships when filed, Romulous Engineering and the commentors in the Participation of Non-Citizen Principals, are virtually identical, the parties will be referred to collectively as "the petitioners" unless specifically referred to by name. The petition filed by Sacramento RSA Limited Partnership (Sacramento) differs insofar as it was a limited partnership when it initially filed its application.

2. The Mobile Services Division (MSD) has also dismissed twenty other applications for various nonwireline RSA markets because the applicants had impermissible alien non-insulated partners under Section 310(b)(3) of the Communications Act. All of these applicants have filed petitions for reconsideration. Because of the similarity of the issues presented in nineteen of these proceedings named in the Committee for a Fair Lottery's motion, we are consolidating the pleadings of those applicants (listed in Appendix A) hereto.[4] Additionally, we deny the petitioners' requests for oral argument because the written record is sufficient to allow us to make a decision.

3. Continental argues that the MSD has erred in dismissing its application for violation of the alien ownership rules as they pertain to partnerships interests held by foreign citizens. Upon further consideration of the record, we find that the MSD was correct in returning Continental's application as defective. We also find the MSD properly returned all of the applications listed in Appendix A.

II. BACKGROUND

4. Continental filed an application for a non-wireline facility to serve the Alaska 2 (Bethel) Rural Service Area (RSA) on July 15, 1988. A lottery was held and Continental was announced as the tentative selectee on Sep-

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[4] We are not including the pleadings filed by FutureWave General Partners (File No. 10810-CL-P-615-A-89), Rural America General Partnership L.P. (File No. 10802-CL-P-560-A-89), or U.S. Telco Partners (File No. 10815-CL-P-620-A-89) as requested by the Committee for a Fair Lottery as those proceedings involve different issues. Great Western Cellular Partners (File No. 10269-CL-P-492-A-90) has also been dismissed for violation of our alien ownership rules. As it also involves different alien ownership issues, it will not be included with the other dismissals in this Order.

tember 27, 1988.[5] The MSD returned Continental's application on October 26, 1988 for failure to comply with the alien ownership restricions of the Communications Act because Continental's partnership contained three alien general partners.[6] On November 30, 1988, Continental filed a Petition for Reconsideration, arguing that Section 310(b)(3) of the Act and Section 22.4 of the Commission's rules only prohibit a grant of a license to a foreign owned corporation and make no mention of partnerships. Continental also argued that it has insulated the alien partners from management and control of the partnership. Finally, Continental stated that its amendment changing the partnership to a limited partnership should be allowed.

5. In *Continental Cellular*, 5 FCC Rcd 691 (1990), the Commission denied reconsideration, stating that while the Act and rules may only specifically refer to corporations, the alien ownership restrictions are also applicable to non-corporate entities and associations. Relying on *Wilner & Scheiner*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986), (*Wilner & Scheiner* and *Wilner & Scheiner Reconsideration Order*), the Commission stated that the statutory restrictions were specifically interpreted to encompass partnerships. In *Wilner & Sheiner Reconsideration Order*, the Commission reasoned that non-limited partners[7] occupy positions comparable to those held by officers and directors in a corporation and construed the officer and director restrictions to apply

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[5] Public Notice, Report No. CL-88-168 (released September 27, 1988).

[6] The dismissal also cited Continental's failure to reveal all of its partners in its application. Given our disposition here it is unnecessary to address this issue.

[7] "Non-limited" partners refer to partners in a partnership without limited partners (such as Continental's partnership as originally filed) and to general partners within a limited partnership. *Wilner & Scheiner Reconsideration Order*, 1 FCC Rcd at note 4.

to these partnership interests.[8] Additionally, the Commission found that although Continental may have tried to insulate the alien partners from management and control, Section 310(b)(3) of the Act reflects a Congressional concern over alien ownership of Commission licenses even in those circumstances where the alien's ownership interest does not confer actual control. The Commission concluded that Continental's application had been properly returned and Continental was not permitted subsequently to file a corrective amendment.

6. Continental then filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit (court). On October 1, 1990, at the Commission's request, the court remanded the case for further consideration of the record.[9] On November 28, 1990, Continental filed Supplemental Comments. The 18 general partnership applicants filed applications for various RSA markets, won the lottery in a market, and were named tentative selectee for the markets in which they won the lottery. The general partnership applicants each had from one to four alien general partners which owned from 2 to 25.984 percent of the applicant. All of these applicants filed amendments to change their alien general partners to limited partners after their applications were filed or to otherwise divest the alien of any control in the partnership. The MSD dismissed these applications for failure to comply with the alien ownership restrictions in Section 310(b)(3) of the Act. All of the general partnerships filed petitions for reconsideration of their dismissals. Sacramento filed an application as a limited partnership pursuant to California law, won a lottery and was named tentative selectee for that market. Sacramento's application was dismissed because it had a 4.545 percent alien

[8] *Id.* at n. 42 and accompanying text.

[9] By Public Notice (Report No. CL-91-21 (released October 26, 1990)), the Commission invited Continental to file comments in order to supplement the record.

non-insulated limited partner in violation of Section 310 (b)(3) of the Act.

III. DISCUSSION

A. Inclusion of a Partnership within the Prohibitions of Section 310(b)(3)

7. The petitioners argue that the prohibitions of Section 310(b)(3) of the Act and Section 22.4 of the rules do not refer or apply to partnership interests because the language of the prohibitions specifically refers only to corporate interests. We do not agree. Section 310(b)(3) of the Act [10] addresses the participation of foreigners in the provision of broadcast, common carrier, aeronautical en route or aeronautical fixed services.[11] The proscriptions of Section 310(b)(3) are also reflected in Section 22.4 of our rules.[12] While the language of the statute and rule

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[10] Section 310(b)(3) states in pertinent part:

(b) No . . . common carrier . . . license shall be granted to or held by—

* * *

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives thereof or by any corporation organized under the laws of a foreign country.

[11] Various petitioners reason that their alien partners are from friendly nations and/or have close ties with the United States. The statute makes no distinction between resident and non-resident aliens; offers no exception depending on the length of the alien's U.S. residence; and provides no exemption because the alien is a citizen of a close ally of the United States. The restrictions of the statute constitute a flat prohibition against certain levels of alien ownership.

[12] Section 22.4 states in pertinent part:

(b) *Alien Ownership.* An authorization may not be granted to or held by:

* * *

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is

specifically addresses corporate applicants, the alien ownership restrictions have been applied with equal force to non-corporate entities and associations.[13] As we noted in *Wilner & Scheiner*:

> the definitional language of the Communications Act provides that the statutory proscriptions extend beyond corporate entities. The definition of "corporation" contained in the Communications Act "includes any corporation, joint-stock company or association." Since a . . . partnership is one form of "association," the statutory language itself establishes that interests in these types of businesses are properly encompassed within the scope of Section 310 (b).

103 FCC 2d at 514 (footnotes omitted). The Commission also noted that use of the word "includes" in the statutory definition of "corporation" suggests there are additional entities which fall under the definition. The petitioners argue that because the definition of "person" in the Act[14] includes both associations and partnerships,

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owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

[13] *See, e.g.*, Farragut Television Corp., 4 RR 2d 350 (1965) (policy holders of a mutual insurance company); Kansas City Broadcasting Co., 5 RR 2d 1057 (1952) (members of a church); Chicagoland TV Co., 4 RR 2d 747 (1965) (members of a labor union); and *Wilner & Scheiner, supra* (partnerships); PrimeMedia Broadcasters, Inc., 3 FCC Rcd 4293 (1988) (partnerships). *See also* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1009 (1984), *reconsidered in part*, 58 Rad. Reg. (P & F) 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986) (*Attribution Orders*) (alien ownership prohibition "applies equally to all financial interests in all business forms of licensees").

[14] "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation. 47 U.S.C. Section 153(i).

the latter are not included within the definition of corporation. This argument would suggest that in an attempt to curb alien ownership of certain communications facilities, Congress prevented only foreign-controlled corporations from holding Commission licenses but not foreign-controlled partnerships. We find this argument untenable. Indeed, it is consistent with the Congressional intent to find limited partnership included within the auspices of Section 310(b)(3). *Id.* at 514-5. To reiterate, the Commission determined in *Wilner & Scheiner,* when asked to decide whether aliens may hold limited partnership interests exceeding the statutory limitation placed on shareholders of a corporate licensee, that limited partnership interests are subject to the citizenship requirements of Section 310(b)(3). Therefore, the inclusion of partnership interests within the prohibitions of Section 310(b)(3) is consistent with the Congressional objective and Commission decisions, and does not represent a new interpretation or rule.

B. Curative Amendments

8. The petitioners argue that the Act does not prohibit the filing of an application with foreign ownership. They posit that any changes prior to final grant are acceptable.[15] The Act does, however, allow the Commission to make any rules and regulations as it may deem necessary.[16] Our cellular processing rules provide that an

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[15] The fact that all of these applicants except Continental were listed on public notices as tentative selectees is irrelevant to our determination in this case. Being named tentative selectee only reflects that an application has received a limited pre-screening by the staff. Each public notice indicates that the application may later be dismissed if found to be defective. *See, e.g.,* Public Notice, Report No. CL-89-254 (released August 24, 1989). *See also* 47 C.F.R. Section 22.2(b) (acceptance for filing "will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in acocrdance with the Commission's rules.").

[16] Section 4(i) of the Communications Act of 1934 states that:

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not incon-

application will be dismissed as unacceptable for filing if it "does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements." 47 C.F.R. Section 22.20(a)(2). An application that does not comply with the alien ownership provisions of the Act and our rules, 47 U.S.C. Section 310(b)(3); 47 C.F.R. Section 22.4(b)(3), is thus unacceptable for filing and properly dismissed.

9. In *Cellular Lottery Rule Making*, 98 FCC 2d 175 (1984), in the interest of administrative efficiency, the Commission framed Section 22.918(b) of the rules to "strictly limit[] the filing of amendments to applications for the below 90 markets under lottery procedures." *Id.* at 220.[17] While Section 22.918(b) does permit the filing

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sistent with this Act, as may be necessary in the execution of its functions.

Section 303 of the Act states in pertinent part that:

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention insofar as it relates to the use of radio to which the United States is or may hereafter become a party.

[17] Although many of the petitioners argue that applicants for radio broadcast facilities have been allowed to amend their applications, the procedure associated with processing of certain applications in the Mass Media Bureau is quite different from the licensing procedure involved here. For example, the procedure for screening applications for FM broadcast service construction permits follows a three-step tenderability-acceptability-grantability review, which contains a thirty day amendment-as-of-right period following the public notice of acceptance for tender. During this period an applicant may file corrective amendments. *See* Report and Order on FM Application Processing, 58 RR 2d 776 (1985). This approach was not adopted for the processing of cellular appli-

of minor amendments by the tentative selectee, we have consistently construed Section 22.918(b) to prohibit post-filing or post-lottery amendments to cure acceptability defects. *See Progressive Cellular III B-2*, 5 FCC Rcd 2772 (1990); *REM Communications*, 3 FCC Rcd 3705 (1988).[18] Accordingly, under our cellular processing standards, any application containing a defect, such as violation of the alien ownership restrictions, is dismissed without opportunity to cure. The fact that the alien ownership restrictions in the Act and our rules do not explicitly say a noncompying application may not be filed does not change this analysis. The language of the alien owneship provision cannot reasonably be read to mean that a noncomplying application can be filed. This fact is particularly true given Question 12 on FCC Form 401 for a Common Carrier radio station authorization,[19] asks

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cations in part because of the large volume of applications expected to be filed for the cellular service. *See* Cellular Lottery Reconsideration Order, 59 RR 2d 407, 410-411 (1985).

[18] There are differences between the use of the Section 22.918(b) minor amendment period in cellular proceedings and the amendment-as-of-right period in FM broadcast proceedings. The cellular minor amendment period does not allow a Part 22 applicant to correct an alien application defect, but submission of such a correction by an FM applicant during the amendment-as-of-right period is permitted. There are other differences between the processing procedures. For instance, during the amendment-as-of-right period, an FM broadcast applicant may amend its financial qualifications and correct multiple ownership problems whereas a cellular applicant may not do either. A cellular applicant may only file amendments which are considered minor, non-curative amendments as defined by Section 22.918 of the Commission's rules. It is well accepted that the Commission may utilize different processing standards for different services. *See e.g.*, David R. Williams d/b/a Industrial Communications, 53 Rad. Reg. 2d (P & F) 38 (1983), *aff'd sub nom.* Williams v. FCC, 721 F.2d 1424 (D.C. Cir. 1983).

[19] Question 12 on FCC Form 401 asks in pertinent part:

> Does the applicant certify that it complies with Section 310(b) of the Communications Act of 1934, as amended, and Section

applicants to certify compliance with the statute's alien ownership restrictions. It cannot be reasonably argued, therefore, that an alien cellular applicant can assume it can file a non-grantable application and fix it later.[20] Therefore, to the extent the application violated the alien ownership restrictions, the MSD was correct in refusing to accept the change of ownership amendments filed by the various applicants in this proceeding.

C. Insulation of Non-Limited Partners

10. Certain petitioners argue that their alien non-limited partners had been insulated from management of the partnership and therefore were in compliance with Section 310(b)(3)'s ownership restrictions because they would be below the 20 percent alien ownership benchmarks.[21] The Commission in *Wilner & Scheiner,* however, made it clear that all non-insulated partnership interests, such as the interests at issue here, will be attributed and considered comparable to the interests held by officers and directors for alien ownership purposes. 103 FCC 2d at 520 n. 43. On reconsideration, the Commission specifically rejected the suggestion that such non-limited partners could avoid the dictates of Section 310 (b)(3) by insulation. 1 FCC Rcd at 15 ("We have no power to accord a statutory 'exemption' to a person holding a positional interest otherwise subject to the scope of

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22.4 of the Commission's Rules regarding alien ownership and control?

All of the applicants in this proceeding answered "yes" to the above question.

[20] *See* PrimeMedia Broadcasting, Inc., *supra* (affirming dismissal of partnership application filed by aliens).

[21] For example, Continental's original partnership agreement, while placing no specific limitations on any of the partners' powers, stated that the day-to-day management would be conducted by one managing partner elected by a majority vote of the partners. This, it asserts, insulates the alien non-limited partner.

Section 310(b) because he or she agrees, as a matter of private contract, not to exercise the powers inherent in that position"). Only insulated limited partners may be treated as shareholders (and not as officers and directors), and then, only when certain circumstances are met.[22] The partners here were all non-limited partners and accordingly, their interests are attributed as those of an officer or director.

11. Additionally, even assuming an exemption could be created for insulated non-limited partners, these petitioners, whose aliens originally filed as general partners, utterly fail to demonstrate that their alien partners were insulated from participating in the day-to-day management of the partnerships if we were to apply the non-attribuiton standards. The partnership agreements themselves, the best evidence of partner rights, contain no provisions that preclude the alien general partners from voting on all partnership business, participating in the management of the business or acting as an officer or employee of the partnership. Even assuming the limited partner non-attribution standards, of *Wilner and Scheiner* and the *Attribution Orders* applied, we find that the petitioners have failed to provide sufficient grounds to avoid

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[22] *Wilner & Scheiner*, 103 FCC 2d at 520 n. 43. The Commission indicated it would use the standards of the *Attribution Orders* to determine whether a limited partner was insulated for Section 310(b)(3) purposes. The *Attribution Orders* required that in order for a limited partner's interest not to be attributed the partnership agreement must state, in express terms, that the exempt limited partner is prohibited from becoming actively involved in the management or operation of the communications business of the partnership. Moreover, the exempt limited partner must not be allowed to vote for the removal of a general partner except for cause. Additionally, the limited partnership agreement must bar the exempted limited partner from serving, in any material capacity, as an independent contractor or agent. Finally, the exempt limited partner cannot act as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the communications enterprises of the company.

treating these alien partners as officers or directors of the partnerships in question.[23]

D. The GTRW Partnership Decision

12. Citing *GTRW Partnership*, 2 FCC Rcd 4160 (Mob. Serv. Div. 1987) (*GTRW*), the petitioners argue that the Commission has previously allowed an applicant with alien partners to file an amendment correcting the Section 310(b)(3) deficiency. In *GTRW*, the partnership filed as a general partnership but later submitted an amendment pursuant to Section 1.65 of our rules informing the Commission that the partnership list filed with its application had omitted two partners. The amendment further stated that one of the originally named general partners was, in fact, an alien; it designated her, and one other originally named partner, as limited partners. All other partners remained general partners. The MSD accepted the amendment and granted GTRW's application, stating that "GTRW corrected, in a timely filed Section 1.65 amendment, the actual citizenship" of the limited partner and that the "nondisclosure of alien ownership in the original application was inadventent." 2 FCC Rcd at 4161.

13. The *GTRW* decision on its face does not even address whether a general partnership with an alien general partner can amend its ownership structure to make the alien a limited partner. Nevertheless, from a review of GTRW's cellular application and pleadings filed in that proceeding, it is apparent that GTRW filed its appli-

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[23] Continental disputes the Commission's conclusion in *Wilner & Scheiner Reconsideration Order* that a partner cannot by private contract insulate itself from management to exempt the partnership from Section 310(b) because any reliquishment of control of a non-limited partner's power would be "extremely unusual." 1 FCC Rcd at 14. However, as noted above, the Commission did not rely simply on the fact that such a contract would be unusual, but also said it had no authority to create such an exemption. *Id.* at 15.

cation as a general partnership, later amended to make an alien a limited partner, and the MSD granted the application. Applying the standards we set forth in the *Cellular Lottery Rule Making, supra,* we cannot support the result reached by the MSD in *GTRW*.[24] Upon discovering that GTRW's application contained an alien general partner, the MSD should have returned the application and denied any subsequent corrective amendment. Accordingly, to the extent by inference *GTRW* can be viewed as reflecting policies that are inconsistent with the Commission's rules, we overrule it.[25]

E. Equal Protection

14. Various petitioners argue that dismissal of applications for alien ownership is improper because it denies the applicants (both aliens and U.S. citizens) their right to equal protection as guaranteed by the Due Process Clause of the Fifth Amendment.[26] Distinctions based on

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[24] We are not by this decision, however, taking any action on the original GTRW license or GTRW's successors in interest since that grant is now final.

[25] Petitioners argue that we may disavow *GTRW* only prospectively. We disagree. The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission's rules. *See e.g.,* Armor Family Broadcasting Group v. FCC, 918 F.2d 960 (D.C. Cir. 1990); Clyde W. Pierce, 4 FCC Rcd 2378 (1989). Despite the erroneous decision in *GTRW*, we believe the Commission's rules were clear that alien ownership defects could not be corrected and thus met the standards set forth in Salzer v. FCC, 778 F.2d 869 (D.C. Cir. 1985).

[26] We note that the Commission is among several federal agencies which Congress has mandated to regulate foreign ownership. *See e.g.,* 10 U.S.C. Section 2272 (no aeronautical design contract shall be awarded to a corporation with more than 25 percent alien ownership); 16 U.S.C. Section 797(e) (Federal Power Commission prohibited to issue licenses for dam construction to aliens or alien controlled entities); 30 U.S.C. Section 1015 (geothermal production leases on federal lands may be issued only to U.S. citizens or domestic corporations or governments); 33 U.S.C. Sections 1502(5),

alienage in federal statutes are permissible as long as the statute is not "wholly irrational" in meeting a legitimate government purpose. *Matthews v. Diaz*, 426 U.S. 67, 83 (1976). With respect to the Communications Act, the United States Court of Appeals for the Seventh Circuit held that alien restrictions found elsewhere in the Act do not violate the Fifth Amendment. *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981).[27] The court in *Campos* only required a showing that the federal exemption of aliens was not wholly irrational in order to be upheld. Congress' intent, with regard to Section 310, was to protect the security of the airwaves in time of war. *Noe* at 741 (citing 68 Cong. Rec. 3037 (1927); *see also Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349 (D.C. Cir. 1991). Indeed, no petitioner has questioned the national public interest established by Congress in Section 310(b)(3) of the Act to protect the security of domestic airwaves.[28]

15. Furthermore, the authority relied upon by the petitioners is inapposite. Both *Plyer v. Doe*, 457 U.S. 202 (1982), and *Takahashi v. Fish and Game Commission*, 334 U.S. 409 (1947), only suggest that a state can-

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1503(g) (only U.S. citizens and domestic corporations can own and operate a deepwater port); and 42 U.S.C. Sections 2133, 2134 (Nuclear Regulatory Commission may not issue licenses to any alien, alien controlled corporation, or foreign government).

[27] The court in *Campos* found that Section 303 of the Act, authorizing the Commission to prohibit aliens from obtaining amateur radio operator's licenses, does not violate the Fifth Amendment.

[28] We also reject the argument that U.S. citizens who are partners in partnerships with impermissible alien ownership are denied equal protection by dismissing the instant applications. United States citizens who join partnerships with aliens are not a suspect class and, therefore, Section 310(b) is constitutional insofar as it affects U.S. citizens for the same reasons that Section 310(b) is constitutional with respect to its treatment of aliens.

not establish laws which discrimiante against aliens without meeting a substantial governmental interest. The federal government is allowed more latitude to regulate aliens than are the states. The reason for this greater latitude is "predicated not merely on the fact that immigration is an exclusively federal interest, but also on the fact that the federal power is of a political nature subject to narrow judicial review." 650 F.2d at 894. As the U.S. Supreme Court noted in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state." *Id.* at 100. In conclusion, there is a rational basis for the alien ownership restrictions and accordingly, we find the petitioners' argument unsupported and without merit.[29]

F. Sacramento

16. When Sacramento filed its application, it was a limited partnership consisting of one general partner and 22 limited partners, one of which was an alien. Sacramento's application was dismissed because the alien limited partner was not sufficiently insulated under *Wilner & Scheiner* and the *Attribution Orders*. Specifically, the MSD stated that the alien limited partner was permitted to advise the partnership in day-to-day operations and to vote in the removal of the general partner without cause —both prohibited powers under the attribution rules. *See* discussion, *supra*, at n.22 and accompanying text. Sacramento argues that its limited partners do not exercise control comparable to officers and directors.

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[29] Certain petitioners do contend that the threat posed by the alien ownership of cellular facilities is significantly less than the threat posed by the alien ownership of broadcast facilities. However, Section 310(b)(3) of the Act does not make such a distinction. Accordingly, the actual threat of any alien control may not be taken into consideration.

17. While the Sacramento partnership agreement may provide certain indicia of insulation, it also contains elements of potential control that are not allowed by Section 310(b)(3) of the Act. *See Wilner & Scheiner*, 103 FCC 2d at 516; *see also PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988). The alien limited partner in Sacramento may advise the partnership in day-to-day activities and may vote to remove the managing general partner without cause. The authority to exercise either of these powers shows a high degree of involvement as both can directly involve the power to manage the day-to-day affairs of the partnership. Since the alien can both advise the managing partner and vote to remove him without cause, the managing partner stands under the threat of being removed if he does not follow the alien partner's advice. These are not the kind of rights enjoyed by an insulated limited partner, and they exceed the control allowable under Section 310(b)(3). While Sacramento claims that its limited partnership agreement complies with the California Limited Partnership Act, the standards for insulation under *Wilner & Scheiner Reconsideration Order* have not been met. The burden is on Sacramento to demonstrate that its partnership agreement does not provide the alien limited partner with sufficient insulation to fall outside the strictures of Section 310(b)(3). Sacramento has failed to meet that burden.[30] Therefore, we find the MSD was correct to return the application of Sacramento.

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[30] Sacramento only refers generally to provisions within its partnership agreement which state the powers of the managing general partner instead of referring to any provision which limits the alien limited partner's power to the degree called for by the *Attribution Order*.

IV. CONCLUSION

18. In conclusion, we apply the rationale of *Wilner & Scheiner* that the statutory prohibition against alien ownership of cellular licenses pertains to partnerships as well as corporations, and that interests of non-limited partners will be considered comparable to those of an officer or director in a corporation. Therefore, any applicant with a non-limited alien partner is prohibited from being granted a license under Section 310(b)(3) of the Act. Additionally, a cellular applicant whose ownership includes a non-limited alien partner cannot later amend its application to cure that defect. Further, a limited partner must be sufficiently insulated in order not to be considered maintaining the control of an officer or director. Finally, the MSD's decision in *GTRW* may not be relied upon to support submission of an amendment that under Commission rules and policies should be dismissed. Therefore, we reject the petitioners' arguments.

V. ORDERING CLAUSES

19. Accordingly, WE AFFIRM our decision in *Continental Cellular* as modified herein that the Mobile Services Division was correct in returning the application filed by Continental Cellular and refusing Continental an opportunity to amend to correct the defect. It is therefore ORDERED that the Petition for Reconsideration, as supplemented, filed by Continental IS HEREBY DENIED.

20. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by 21st Century (Utah), 21st Century (Ind), Cells, Cellswitch, CRLP, Cellwave, CGSA, Electronics, Delta, Eastern, Federal, Independent, Jefferson, Moving Phones, Quadrangle, Sacramento, Silver Wings, USTP and Western ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following applications have been consolidated with the Continental Cellular for consideration on the record:

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Utah))
File No. 10109-CL-P-675-A-88
Utah 3—Juab

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Ind))
File No. 10311-CL-P-403-A-88
Indiana 1—Newton

CELLS COMPANY L.P.
(Hereafter referred to as Cells)
File No. 10621-CL-P-366-A-89
Florida 7—Hamilton

CELLSWITCH L.P.
(Hereafter referred to as Cellswitch)
File No. 10513-CL-P-460-A-89
Louisiana 7—West Feliciana

CELLULAR REGIONAL LIMITED PARTNERSHIP
(Hereafter referred to as CRLP)
File No. 10266-CL-P-423-A-88
Iowa 12—Winneshiek

CELLWAVE TELEPHONE SERVICES L.P.
(Hereafter referred to as Cellwave)
File No. 10625-CL-P-370-A-89
Florida 11—Monroe

CGSA TELEPHONES
(Hereafter referred to as CGSA)
File No. 10511-CL-P-458-A-89
Louisiana 5—Beauregard

CONTINENTAL ELECTRONICS
(Hereafter referred to as Electronics)
File No. 10104-CL-P-545-A-88
Nevada 3—Storey

DELTA CELLULAR PARTNERS
(Hereafter referred to as Delta)
File No. 10613-CL-P-313-A-89
Alabama 7—Butler

EASTERN CELLULAR SYSTEMS L.P.
(Hereafter referred to as Eastern)
File No. 10540-CL-P-440-A-89
Kansas 13—Edwards

FEDERAL MOBILE RADIO
(Hereafter referred to as Federal)
File No. 10038-CL-P-319-A-88
Arizona 2—Coconino

INDEPENDENT CELLULAR SYSTEMS L.P.
(Hereafter referred to as Independent)
File No. 10049-CL-P-699-A-88
Washington 7—Skamania

JEFFERSON CELLULAR L.P.
(Hereafter referred to as Jefferson)
File No. 10449-CL-P-509-A-89
Missouri 6—Marion

MOVING PHONES PARTNERSHIP L.P.
(Hereafter referred to as Moving Phones)
File No. 10265-CL-P-488-A-88
Minnesota 7—Chippewa

QUADRANGLE COMMUNICATIONS
(Hereafter referred to as Quadrangle)
File No. 10407-CL-P-659-A-88
Texas 8—Gaines

SACRAMENTO RSA LIMITED PARTNERSHIP
(Hereafter referred to as Sacramento)
File No. 10420-CL-P-672-A-89
Texas 21—Chambers

SILVER WINGS 1988 L.P.
(Hereafter referred to as Silver Wings)
File No. 10083-CL-P-611-A-88
Oregon 6—Crook

U.S. RSA TELCO PARTNERS
(Hereafter referred to as USTS)
File No. 10174-CL-P-634-A-88
South Dakota 1—Harding

WESTERN CELLTEL L.P.
(Hereafter referred to as Western)
File No. 10230-CL-P-427-A-88
Iowa 16—Lyon

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. 10003-CL-P-316-A-88

IN RE APPLICATION OF: CONTINENTAL CELLULAR

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A. in Market 316. Alaska 2 (Bethel).

and

File Nos. 10109-CL-P-675-A-88, 10311-CL-P-403-A-88, 10621-CL-P-366-A-89, 10513-CL-P-460-A-89, 10226-CL-P-423-A-88, 10625-CL-P-370-A-89, 10511-CL-P-458-A-89, 10104-CL-P-545-A-88, 10613-CL-P-313-A-89, 10504-CL-P-440-A-89, 10038-CL-P-319-A-88, 10049-CL-P-699-A-88, 10449-CL-P-509-A-89, 10265-CL-P-488-A-88, 10407-CL-P-659-A-88, 10420-CL-P-672-A-89, 10083-CL-P-611-A-88, 10174-CL-P-634-A-88, 10230-CL-P-427-A-88

IN RE: NINETEEN RURAL SERVICE AREA APPLICATIONS FILED BY PARTNERSHIPS WITH ALIEN PARTNERS

ERRATUM

Released: December 6, 1991

The *Memorandum Opinion and Order*, FCC 91-355, released November 20, 1991, in the above-captioned matter inadvertantly included the application filed by

Cellwave Telephone Services L.P. (File No. 10625-CL-P-370-A-89) for the Florida 11 (Monroe) RSA. While this application was initially dismissed for impermissible alien ownership, the issues involved are different from those discussed in the underlying Order. Accordingly, the Order is hereby amended as follows:

File No. 10003-CL-P-316-A-88

IN RE APPLICATION OF: CONTINENTAL CELLULAR

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel).

and

File Nos. 10109-CL-P-675-A-88, 10311-CL-P-403-A-88, 10621-CL-P-366-A-89, 10513-CL-P-460-A-89, 10226-CL-P-423-A-88, 10511-CL-P-458-A-89, 10104-CL-P-545-A-88, 10613-CL-P-313-A-89, 10504-CL-P-440-A-89, 10038-CL-P-319-A-88, 10049-CL-P-699-A-88, 10449-CL-P-509-A-89, 10265-CL-P-488-A-88, 10407-CL-P-659-A-88, 10420-CL-P-672-A-89, 10083-CL-P-611-A-88, 10174-CL-P-634-A-88, 10230-CL-P-427-A-88

* * * *

IN RE: EIGHTEEN RURAL SERVICE AREA APPLICATIONS FILED BY PARTNERSHIPS WITH ALIEN PARTNERS

2. The Mobile Services Division (MSD) has also dismissed twenty other applications for various nonwireline RSA markets because the applicants had impermissible alien non-insulated partners under Section 310(b)(3) of the Communications Act. All of these applicants have filed petitions for reconsideration. Because of the similarity of the issues presented in eighteen of these proceedings named in the Committee for a Fair Lottery's mo-

tion, we are consolidating the pleadings of those applicants (listed in Appendix A) hereto.[4] Additionally, we deny the petitioners' requests for oral argument because the written record is sufficient to allow us to make a decision.

* * * *

6. Continental then filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit (court). On October 1, 1990, at the Commission's request, the court remanded the case for further consideration of the record. On November 28, 1990, Continental filed Supplemental Comments. The 17 general partnership applicants filed applications for various RSA markets, won the lottery in a market, and were named tentative selectee for the markets in which they won the lottery. The general partnership applicants each had from one to four alien general partners which owned from 2 to 25.984 percent of the applicant. All of these applicants filed amendments to change their alien general partners to limited partners after their applications were filed or to otherwise divest the alien of any control in the partnership. The MSD dismissed these applications for failure to comply with the alien ownership restrictions in Section 310(b)(3) of the Act. All of the general partnerships filed petitions for reconsideration of their dismissals. Sacramento filed an application as a limited partnership pursuant to California law, won a lottery and was named tentative selectee for that market. Sacra-

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[4] We are not including the pleadings filed by FutureWave General Pratners (File No. 10810-CL-P-615-A-89), Rural America General Partnership L.P. (File No. 10802-CL-P-560-A-89), U.S. RSA Telco Partners (File No. 10815-CL-P-620-A-89), or Cellwave Telephone Services L.P. (File No. 10625-CL-P-370-A-89) as requested by the Committee for a Fair Lottery as those proceedings involve different issuers. Great Western Cellular Partners (File No. 10269-CL-P-492-A-90) has also been dismissed for violation of our alien ownership rules. As it also involves different alien ownership issues, it will not be included with the other dismissals in this Order.

mento's application was dismissed because it had a 4.545 percent alien non-insulated limited partner in violation of Section 310(b)(3) of the Act.

* * * *

20. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by 21st Century (Utah), 21st Century (Ind.), Cells, Cellswitch, CRLP, CGSA, Electronics, Delta, Eastern, Federal, Independent, Jefferson, Moving Phones, Quadrangle, Sacramento, Silver Wings, USTP and Western ARE HEREBY DENIED.

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South Dakota 1—Harding

WESTERN CELLTEL L.P.
(Hereafter referred to as Western)
File No. 10230-CL-P-427-A-88
Iowa 16—Lyon

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1611

MOVING PHONES PARTNERSHIP L.P.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

and Consolidated Cases

Before: Mikva, Chief Judge; Sentelle and Henderson, Circuit Judges

ORDER

[Filed Oct. 5, 1993]

Upon consideration of Appellants', 21st Century Telecom L.P., et al., petition for rehearing, filed September 13, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
RON GARVIN,
Clerk

By: /s/ Linda Jones
LINDA JONES
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1611

MOVING PHONES PARTNERSHIP L.P.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

and Consolidated Cases

Before: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Oct. 5, 1993]

Appellants', 21st Century Telecom L.P., et al., Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN,
Clerk

By: /s/ Linda Jones
LINDA JONES
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1611

MOVING PHONES PARTNERSHIP L.P.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

and Consolidated Cases

Before: Mikva, Chief Judge; Sentelle and Henderson, Circuit Judges

ORDER

[Filed Oct. 5, 1993]

Upon consideration of Appellants', Delta Cellular Partners, et al., petition for rehearing, filed September 13, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
RON GARVIN,
Clerk

By: /s/ Linda Jones
LINDA JONES
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1611

MOVING PHONES PARTNERSHIP L.P.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

and Consolidated Cases

Before: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Oct. 5, 1993]

Appellants', Delta Cellular Partners, et al., Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN,
Clerk

By: /s/ Linda Jones
LINDA JONES
Deputy Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 U.S.C. § 310

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

SEC. 310. [47 U.S.C. 310] (a) The station license required under this Act shall not be granted to or held by any foreign government or the representative thereof.

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 C.F.R. § 1.65

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a

pending application or in Commission proceedings involving a pending application. Except where paragraph (b) of this section applies, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Except where paragraph (b) of this section applies, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

47 C.F.R. § 22.4

§ 22.4 Eligibility.

(a) *General.* Authorizations will be granted upon proper application if:

(1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under those laws;

(2) There are frequencies available to provide satisfactory service; and

(3) The public interest, convenience or necessity would be served by a grant.

(b) *Alien ownership.* An authorization may not be granted to or held by:

(1) Any alien or the representative of any alien.

(2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

(4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 C.F.R. § 22.20

§ 22.20 Defective applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character, or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

(b) Some examples of common deficiencies which result in defective applications under paragraph (a) of this section are:

(1) The application is not filled out completely and signed (responses intended to be omitted must include the notation "not applicable" or "N/A");

(2) The application does not demonstrate how the proposed radio facilities will serve the public need or interest;

(3) The application does not demonstrate compliance with the special requirements applicable to the radio service involved;

(4) [Reserved]

(5) The application does not include an environmental assessment as required for an action that may have a significant impact upon the environment, as defined in § 1.1307 of this chapter.

(6) [Reserved]

(7) The application is filed after the cutoff date prescribed in § 22.31 of this part;

(8) The application proposes the use of a frequency not allocated to such use.

(c) [Reserved]

(d) If an applicant is requested by the Commission to file any documents or any supplementary or explanatory information not specifically required in the prescribed application form, a failure to comply with such request within a specified time period will be deemed to render the application defective and will subject it to dismissal.

47 C.F.R. § 22.23

§ 22.23 Amendment of applications. (See also § 22.918)

(a) *Amendments as of right.* A pending application may be amended as a matter of right if the application

has not been designated for hearing or placed on public notice for a random selection process.

(1) Amendments shall comply with § 22.29, as applicable; and

(2) Amendments which resolve interference conflicts or amendments under § 22.29 may be filed at any time.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or selected under the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

(c) *Major amendments, minor amendments.* The Commission will classify all amendments as minor except in the cases listed below. An amendment shall be deemed to be a major amendment subject to §§ 22.27 and 22.31 under any of the following circumstances:

(1) *Change in technical proposal.* If the amendment results in a substantial change in the engineering proposal such as (but not necessarily limited to):

(i) A change in, or an addition of, a radio frequency; or

(ii) A change in the class of station (*e.g.*, from control to base).

(2) *Amendments to proposed base station facilities.* If the amendment enlarges the reliable service area of the proposed base station facilities by more than one (1) mile along any of eight radials spaced every forty-five (45) degrees from zero degree True North. This will not apply if the extension is into a service area presently authorized to the applicant and on the same frequency.

(3) If in the Domestic Public Cellular Radio Telecommunications Service, the amendment results in an increase in the Cellular Geographic Service Area.

(4) *Changes in ownership or control.* If the amendment specifies a substantial change in beneficial owner-

ship or control (*de jure* or *de facto*) of an applicant. *Provided, however,* such a change would not be considered major if it is unvoluntary or where it merely amends an application for modification of an authorized station to reflect a change in ownership or control that has previously been approved by the Commission.

(f) Any amendment to an application shall be signed and shall be submitted in the same manner, and with the same number of copies, as was the original application. Amendments may be made in letter form if they comply in all other respects with the requirements of this chapter.

47 C.F.R. § 22.917

§ 22.917 Demonstration of financial qualifications.

(c) *Rural Service Areas.* (1) A non-wireline applicant for a new station shall demonstrate, at the time it files its application that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system. The firm financial commitment may be contingent on the applicant obtaining a construction permit. The same commitment may be used for each application filed, subject to the following provisions:

(i) Where a non-wireline applicant provides a firm financial commitment that is not contingent upon the applicant obtaining a construction permit, the commitment need not be market specific and may be applied to any market or markets applied for as long as the commitment is sufficient to cover the costs of the proposed RSA systems.

(ii) Where a non-wireline applicant provides a firm financial commitment that is contingent upon the applicant obtaining a construction permit and that is restricted on its face to a specific market or markets, the commitment may be used only for the markets to which it refers

and must be sufficient to cover the costs of the proposed RSA systems.

(iii) Where a non-wireline applicant provides a firm financial commitment that is contingent upon the applicant obtaining a construction authorization and that indicates that the bank or lending institution has reviewed the projects for which the applicant is applying, but the commitment is not restricted to any specific market, it may be applied to any market or markets applied for as long as the commitment is sufficient to cover the costs of the proposed RSA systems.

47 C.F.R. § 22.918

§ 22.918 Amendment of cellular applications.

(a) *Top-90 markets.* Minor and technical amendments and those required by § 1.65 of the rules; but no major amendments as defined in § 22.23(c), may be proffered within forty-five days of public notice of the filing of an application for the top-90 cellular modified Metropolitan Statistical Areas.

(b) *Markets below the top-90 and Rural Service Areas.* Amendments for applications for below-90 cellular markets may not be filed prior to conduct of the lottery for the market applied for. The tentative selectee may file minor amendments, but no major amendments except for those listed in § 22.23(g). Information required by § 1.65 shall be filed within 14 days of publication of the Public Notice announcing the tentative selectee in markets below the top-90 and within 30 days of the Public Notice announcing the lottery results for all applications to serve Rural Service Areas.

47 C.F.R. § 22.923

§ 22.923 Content and form of Rural Service Area applications.

(a) Applications for new stations or for modified facilities increasing the Cellular Geographic Service Area of existing stations shall be filed on FCC Form 401. The following exhibits shall be attached to any such application:

(1) An exhibit including a map or maps of the cellular system's existing Cellular Geographic Service Area, if any, and the Cellular Geographic Service Area proposed in the application. This exhibit shall contain all the information specified in § 22.903(a)(1). In addition, this exhibit shall include an 8½ by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map, depicting the complete RSA and any CGSA(s) therein. Boundaries of the RSA, CGSA(s), and 39 dBu contours must be clearly indicated, required by § 22.903(a). The full-size map need not be included in the microfiche copies of the application, but must be present in the original application from which the microfiche is made. For microfiching purposes, the reduced map is sufficient.

(2) An exhibit containing the engineering data and calculations used to derive the service contours shown. See § 22.903(c).

(3) An exhibit stating how the proposal complies with the Commission's cellular design concepts, and indicating the applicant's projected method for coordinated expansion of the system in response to changing service demands.

(4) An exhibit indicating the basis which the applicant will use to determine whether sufficient congestion exists to warrant cell-splitting.

(5) An exhibit indicating the frequency plan to be used if the application is granted.

(6) An exhibit indicating the applicant's service proposals for local subscribers and roamers, including its method of handling complaints. If no change is made in service proposals previously authorized, this exhibit may be omitted.

(7) For new stations only, an exhibit including full particulars regarding the cost of construction of the proposed facilities and demonstrating how the applicant intends to finance construction. See § 22.917.

(8) Where the applicant is a wireline carrier, an exhibit indicating exactly how its proposed system would interconnect with the landline network. This information must be of sufficient specificity to enable a potential competitor to design its system to connect with the landline system in exactly the same manner if the competitor so chooses.

(9) An exhibit setting forth the information required by § 22.13(a)(1). Individual applicants holding less than 5% interest in a publicly held company must disclose the fact that the corporation and the applicant both have filed applications in the same RSA, its disclosure must include its percentage interest held in the company.

(10) An exhibit indicating the state and counties included in the applicant's CGSA.

(11) An exhibit indicating whether a grant of the application will be a major action under § 1.1305 of the Commission's Rules.

(b) Applications for construction permits for initial cellular systems for Rural Service Areas shall be filed as set forth below:

(1) Two microfiche copies of each application must be submitted and enclosed in microfiche jackets and be placed in a sealed 5 inch x 7½ inch microfiche envelope. One microfiche jacket shall be labeled "Original" and the other jacket labeled "Copy". The microfiche must be

reproduced only in negative form and in black and white (blue/black film which appears black to the naked eye is acceptable). The original microfiche must be of archival quality as defined in § 22.2 of these Rules. Applicants are required to submit a Transmittal Sheet For Cellular Applications, copies of which may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

(2) Within seven (7) days of the release date of the public notice announcing the lottery results, the applicant selected first in the lottery shall submit the original and two hard copies of the application which must be enclosed in stiff covers and fastened securely along the left edge without exposed sharp edges (e.g., looseleaf binders, plastic binding strips, covered metal clasps).

(3) For initial RSA applications, FAA notification should not be made at the time of filing. Upon release of the public notice designating the tentative selectee, the applicant so designated must file Notice of Proposed Construction or Alteration (FAA Form 7460-1) with the FAA for any antenna or tower sites requiring FAA notification. Block 3A of FAA Form 7460-1 must contain the RSA number after the phone number so that the completed form can be associated with the proper application.

(4) FCC Form 401, Schedule B, Page 3, must contain the RSA number after the applicant's name so that the form may be reassociated with the application after proper clearances have been obtained.

(5) The applicant's name and the market, market number and frequency block applied for must appear at top right hand corner of each microfiche application. In addition the applicant's name and the market, market number and frequency block must also appear on a 5 x 7½ inch microfiche envelope, which shall contain the microfiche applications. This information must be clearly

labeled in print or mechanically reproduced. In addition, the information on the transmittal sheet and on the microfiche envelope must be identical.

(6) The completed transmittal sheet, the filing fee, and the microfiche envelope shall be placed in a 9 inch x 12 inch sealed enveloped. The applicants name and RSA market number must prominently be displayed in the center of the envelope for all applications sent by mail and placed in the lower left hand corner for applications delivered to the Strip Commerce Center Facility.

(7) All applicants must certify to the following on the Transmittal Sheet:

CERTIFICATION

I hereby certify, under penalties of perjury, this application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

I also certify the applicant is the real party in interest in this application and there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. It is also certified that the application intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.

I declare, under penalties of perjury, that I am the authorized representative of the above-named applicant in the above entitled matter, that I have read the foregoing certification; and the matter and things therein stated are true and correct.

Executed on

—[date] ———————————————————

—Signature ———————————————————

Type/Print Name ———————————————————

Type/Print Title ———————————————————

All persons signing the Certification must do so using ink. No mechanical reproduction of signatures may be used.

(c) Applications proposing modifications to existing stations which do not involve new facilities, an increase in height or power of existing facilities, or an increase of any CGSA boundary, may be filed on FCC Form 489.

(1) Applications to extend the 39 dBu contours beyond the borders of the RSA once the original RSA application is granted must be accompanied by a detailed engineering justification demonstrating the necessity for such extensions.

Supreme Court, U.S.
FILED
MAR 9 1994
THE CLERK

No. 93-1074

In the Supreme Court of the United States

OCTOBER TERM, 1993

CELLSWITCH L.P., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Federal Communications Commission properly dismissed petitioners' applications for cellular radio licenses because the applications as originally filed included aliens among the general partners in violation of Section 310(b) of the Communications Act, as amended, 47 U.S.C. 310(b), and because subsequent amendments to cure disqualifying defects are not permitted under the Commission's strict procedures for processing cellular applications.

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FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 998 F.2d 1051. The opinion of the Federal Communications Commission (Pet. App. 14a-34a) is reported at 6 F.C.C. Rcd. 6834, and an erratum amendment to the opinion (Pet. App. 35a-41a) is reported at 6 F.C.C. Rcd. 7205.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1993. Petitions for rehearing with suggestions for rehearing en banc were denied on October 5, 1993. Pet. App. 42a-45a. The petition for a writ of certiorari was filed on January 3, 1994. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed applications seeking authority to construct and operate new cellular radio telephone systems in a number of markets. At the time they filed their applications, petitioners were organized as general partnerships. Each of the applications listed one or more general partners who were not United States citizens. Pet. App. 6a.

Selection of cellular licensees in the markets for which petitioners applied was accomplished by the use of lotteries. See *Cellular Lottery Order*, 98 F.C.C.2d 175, 179 (1984), reconsideration, 101 F.C.C.2d 577 (1985), further reconsideration, 59 Rad. Reg. 2d (P & F) 407 (1985) (*Lottery Further Reconsideration Order*), aff'd in relevant part *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987). See also *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) 1029, 1037 (1986) (lottery procedures applied to applications for Rural Service Areas), modified, 2 F.C.C. Rcd. 733 (1987), further modified, 2 F.C.C. Rcd. 3366 (1987), 3 F.C.C. Rcd. 4403 (1988), and 4 F.C.C. Rcd. 4464 (1989). Petitioners' applications were selected in the respective lotteries in which they were included. Pet. App. 6a.

After an application is selected in a lottery, the staff reviews that application to ensure that it complies with FCC rules, regulations and other requirements and is therefore acceptable for filing. 47 C.F.R. 22.20(a)(2). If the application does not meet the standards for acceptability, it is dismissed without

further consideration. *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410.

The post-lottery examination of petitioners' applications revealed that aliens were included among petitioners' general partners. Pet. App. 6a. The Federal Communications Commission (Commission) concluded that petitioners' applications did not comply with the alien ownership prohibitions of Section 310(b)(3) of the Communications Act, 47 U.S.C. 310(b)(3), and Section 22.4(b)(3) of the FCC's rules, 47 C.F.R. 22.4(b)(3). The Commission had previously held that the statutory restrictions on alien corporate ownership set out in Section 310(b) apply to partnership interests. *Wilner & Scheiner*, 103 F.C.C. 2d 511 (1985), reconsideration in part, 1 F.C.C. Rcd. 12 (1986). Petitioners' applications were accordingly dismissed. Pet. App. 6a-7a.

The Commission declined to allow petitioners to cure this disqualifying defect through amendments to their applications. Pet. App. 21a-24a. The Commission explained that its refusal to allow curative amendments had been a consistent feature of its policy since the conversion to a lottery system for selecting cellular licensees. *Id.* at 22a-23a. The purpose of the policy is to minimize the administrative burden on the Commission's staff and to permit the orderly processing of thousands of cellular applications. See *Cellular Lottery Order*, 98 F.C.C.2d at 220. The policy against curative amendments is set forth in a Commission rule, 47 C.F.R. 22.918(b). That rule generally prohibits the filing of any amendment until after the Commission has completed its examination of the application selected in the lottery and has found that the application as originally submitted was

acceptable for filing. In that situation, the Commission issues a public notice announcing the qualified tentative selectee for the market in question, and after that announcement the applicant designated therein may file minor amendments to its application. See Pet. App. 22a-23a; *Cellular Lottery Order*, 98 F.C.C.2d at 220; *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410 n.17. See also, *e.g.*, *REM Communication*, 3 F.C.C. Rcd. 3705 (1988).[1]

2. The court of appeals affirmed the Commission's order dismissing petitioners' applications. The court declined to apply strict scrutiny in reviewing petitioners' constitutional challenge to the restrictions on alien ownership. Under established precedent, the court held, "classifications based [on] alienage in federal statutes are permissible so long as the

[1] Section 22.918(b) of the Commission's rules was amended in 1986 to allow an exception to the prohibition against the filing of an amendment prior to the announcement of a qualified tentative selectee. The exception requires that amendments pursuant to Section 1.65 of the Commission's rules, 47 C.F.R. 1.65, must be filed by the winning applicant within 30 days of the public notice announcing the lottery results even though this filing date precedes a determination that the applicant is a qualified tentative selectee. *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) at 1038. Section 1.65 requires applicants to ensure the continuing accuracy and completeness of information furnished in a pending application. Whenever information in a pending application is no longer substantially complete or accurate, the applicant must amend its application to furnish such additional or corrected information as is appropriate. In revising Section 22.918(b) to accommodate Rule 1.65 amendments, the Commission did not purport to change its absolute prohibition on the use of amendments to cure disqualifying defects in applications as originally submitted.

challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose." Pet. App. 9a (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976)). The court acknowledged that strict scrutiny had sometimes been applied to alienage-based classifications imposed by *state* governments where the challenged provisions "struck at the noncitizens' ability to exist in the community." Pet. App. 9a (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978)). It noted, however, that "[t]he opportunity to own a broadcast or common carrier radio station is hardly a prerequisite to existence in a community," and it concluded that the application of a rational basis test in this case was appropriate. Pet. App. 9a-10a.

The court further determined that the restrictions on alien partnership interests represented a reasonable exercise of the Commission's delegated authority. The court noted that "it is clear that a [statutory] ban on alien ownership exists; what is lacking is a clear direction from Congress as to the point at which the FCC will effectuate the ban." Pet. App. 11a. Under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), the court concluded, "the Commission's regulatory scheme is entirely consistent with the congressional mandate embodied in [47 U.S.C.] 310(b)." Pet. App. 11a.

The court of appeals also upheld the Commission's decision to dismiss petitioners' applications without allowing an opportunity for amendment. Pet. App. 11a-12a. Citing the Commission's rule governing acceptability, 47 C.F.R. 22.20(a)(2), and the rule governing acceptance of amendments to cellular applications, 47 C.F.R. 22.918(b), the court held that read

together, these rules "alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications." Pet. App. 12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition presents no important unsettled question of law. Further review therefore is not warranted.

1. Relying on *Plyler* v. *Doe*, 457 U.S. 202 (1982), petitioners contend (Pet. 22-23) that resident aliens comprise a suspect class and that legal disabilities based upon their status must be subjected to strict scrutiny. The Court in *Plyler*, however, expressly *declined* to hold that the alien plaintiffs were members of a suspect class. 457 U.S. at 223. Its invalidation of the challenged restrictions, moreover, was largely based upon its recognition that "[t]he States enjoy no power with respect to the classification of aliens" because "[t]his power is 'committed to the political branches of the Federal Government.'" *Id.* at 225 (quoting *Mathews* v. *Diaz*, 426 U.S. at 81). In the present case, as the court of appeals recognized, Congress has unequivocally mandated the imposition of restrictions on alien ownership of radio licensees, and it has delegated to the Commission the task of determining precisely how far those restrictions will extend. Pet. App. 11a.[2]

[2] The limitation on alien partnership interests is derived from Section 310(b) of the Communications Act, 47 U.S.C.

Petitioners' reliance on *Plyler* is therefore unavailing.

The court of appeals correctly stated that "classifications based [on] alienage in federal statutes are permissible so long as the challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose." Pet. App. 9a (quoting *Mathews* v. *Diaz*, 426 U.S. at 83). Accord *Campos* v. *FCC*, 650 F.2d 890, 894 (7th Cir. 1981) ("alienage-based classifications are not under existing law suspect in any category of cases for Fifth Amendment purposes"). The court properly rejected petitioners' constitutional challenge based on its determination that the restriction on alien ownership rationally effectuates a legitimate national security purpose. Pet. App. 8a-10a. Accord *Campos*, 650 F.2d at 891, 893-894 (47 U.S.C. 303(*l*)(1), which generally prohibits the Commission from granting commercial radio operator licenses to aliens, is constitutional). [3]

2. The court of appeals properly upheld the Commission's refusal to allow petitioners to cure through amendments the disqualifying defects in their applications. The requirement that cellular radio

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310(b). As the court of appeals concluded, the Commission has reasonably interpreted that statutory provision to prohibit a partnership that includes aliens among its general partners from holding a radio license. Pet. App. 10a-11a (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

[3] In its opinion in the present case, the Commission noted that it is "among several federal agencies which Congress has mandated to regulate foreign ownership." Pet. App. 27a n.26 (citing various statutes restricting alien ownership or control of strategic or otherwise sensitive assets).

applicants be qualified at the time their applications are originally filed, with no opportunity thereafter for curative amendments, is critical to the Commission's effort to expedite the process of selecting cellular licensees. See *Cellular Lottery Order*, 98 F.C.C.2d at 220; *Lottery Further Reconsideration Order*, 59 Rad. Reg. 2d (P & F) at 410 n.17; 47 C.F.R. 22.918(b). The Commission's decision here is consistent with prior cases in which the agency has refused to permit cellular applicants to cure defective applications by amendment in order to establish their qualifications to be announced as the tentative selectee. See, *e.g.*, *REM Communication, supra*; *Progressive Cellular III B-2*, 5 F.C.C. Rcd. 2772, 2773 (1990), modified, 6 F.C.C. Rcd. 6745 (1991).

Petitioners' reliance (Pet. 9-14) upon a 1986 amendment to 47 C.F.R. 22.918(b) is misplaced.[4] The 1986 revision merely provides that pursuant to 47 C.F.R. 1.65, an applicant must promptly submit any amendment necessary to ensure the continuing accuracy and completeness of its application, even if it has not been announced as a qualified tentative selectee.

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[4] Petitioners first raised this argument in their petition for rehearing with suggestion for rehearing en banc. Because the argument was neither presented to nor addressed by the court of appeals, this Court should not consider it. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Indeed, petitioners' failure to present this argument to the Commission would have precluded them from raising it in the court of appeals even if it had been asserted in that court in a timely fashion. See *Cellnet Communication, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992); *MCI Telecommunications Corp.* v. *FCC*, 842 F.2d 1296, 1302 (D.C. Cir. 1988); 47 U.S.C. 405. Cf. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

See note 1, *supra*. In amending Section 22.918(b), the Commission did not purport to alter the rule that an applicant that is unqualified at the time its application is submitted may not cure the defect through a subsequent amendment.

This limited revision of Rule 22.918(b) occurred when the Commission adopted its filing and processing procedures for Rural Service Area applications. The Commission explained that the revision was necessary to "eliminate the need for requests for extensions of time to file 1.65 amendments which were so prevalent" in the Metropolitan Statistical Area markets below the top 120. *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) at 1038. The Commission did not suggest that this minor change in Rule 22.918(b) would signal any retreat from the prohibition against the use of amendments to cure disqualifying defects in applications as originally submitted. On the contrary, the Commission, in adopting filing and processing procedures for Rural Service Area applications, expressly found "that the public interest would generally best be served by adhering to the application procedures prescribed for" the Metropolitan Statistical Area markets. *Rural Cellular Service Rules*, 60 Rad. Reg. (P & F) 2d at 1037.

Relying on *Radio Athens, Inc. (WATH)* v. *FCC*, 401 F.2d 398, 403 (D.C. Cir. 1968), and *Salzer* v. *FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), petitioners assert an entitlement to clear notice of the Commission's application acceptability criteria. See Pet. 15-20. Petitioners further argue (Pet. 19-20) that the agency's prior decisions in *Advanced Business Communications, Inc.*, 2 F.C.C. Rcd. 3751 (1987), and *GTRW*

Partnership, 2 F.C.C. Rcd. 4160 (1987), obscured the Commission's policy to such an extent as to deny petitioners sufficient warning of the agency's treatment of defective applications. The amendment permitted in *Advanced Business Communications* has been characterized as the correction of a "clerical error," see *REM Communication*, 3 F.C.C. Rcd. at 3706, and the agency's willingness to allow it is in no way inconsistent with its decision here. The Commission in the instant case determined that the decision in *GTRW* could not be reconciled with *Cellular Lottery Rule Making*. See Pet. App. 27a. It concluded, however, that "[d]espite the erroneous decision in *GTRW*, we believe the Commission's rules were clear that alien ownership defects could not be corrected and thus met the standards set forth in [*Salzer*]." Pet. App. 27a n.25. The court of appeals likewise held that the agency's rules had provided petitioners with sufficient notice of Commission policy. *Id.* at 12a. That holding was correct; and, in any event, petitioner's fact-specific challenge to the court of appeals' application of settled legal principles does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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WILLIAM E. KENNARD
General Counsel
Federal Communications Commission

MARCH 1994

MAR 10 1994
OFFICE OF THE CLERK

No. 93-1074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CELLSWITCH L.P. *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION

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March 9, 1994

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the Federal Communications Commission did not act in an arbitrary and capricious manner when it dismissed the cellular applications of petitioners because those applications were not filed in compliance with the applicable rules of the agency concerning alien ownership.

2. Whether the court of appeals correctly declined to apply strict scrutiny to Congress' limitation on the holding of common carrier radio licenses by aliens, as set forth in the Communications Act of 1934, as amended, 47 U.S.C. § 310(b).

PARTIES TO THE PROCEEDING

Petitioners are listed in the Petition. Respondent Federal Communications Commission was appellee below. Private respondents, AAT RSA Company, L.P., Michael B. Azeez, CSH Cellular, Gilcom Cellular, L.P., Marco Communications Corp., RSA Cellular Company, and Percival Vaz were intervenors below. Miscellco Communications, Inc., is the successor in interest to PC Cellular, Inc., which was also an intervenor below.

Pursuant to Rule 29.1 of the Rules of this Court, private respondents state that they have neither parent nor subsidiary companies, except those that are wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1074

CELLSWITCH L.P. *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION

Private respondents, AAT RSA Company, L.P., Michael B. Azeez, CSH Cellular, Gilcom Cellular, L.P., Marco Communications Corp., Miscellco Communications, Inc., RSA Cellular Company, and Percival Vaz, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the District of Columbia Circuit's decision in this case.

STATEMENT OF THE CASE

Nature Of The Case. Petitioners applied to the Federal Communications Commission for authorizations to construct and operate cellular systems in the Rural Service Areas ("RSAs"). Each petitioner had its application dismissed by the FCC because each petitioner was a general partnership that included one or more alien general partners in violation of the alien ownership re-

strictions of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b) (the "Act"). The United States Court of Appeals for the District of Columbia Circuit held that the FCC acted reasonably in interpreting the alien ownership restrictions of the Act and in dismissing petitioners' applications because they did not comply with the FCC's strict rules for processing RSA cellular applications.

Regulatory Framework. In 1981, the FCC released rules governing the licensing of cellular service. *Cellular Communications Systems*, 86 F.C.C.2d 469, 470 (1981), *recon.*, 89 F.C.C.2d 58, *further recon.*, 90 F.C.C.2d 571, *order*, 52 Rad. Reg. 2d (P&F) 401 (1982). The Commission initially adopted a comparative hearing process to award licenses in the top 30 markets, the Metropolitan Statistical Areas ("MSAs"). 86 F.C.C.2d at 498-500. The Commission, stressing the need to "avoid undue delay in awarding cellular licenses," adopted "special procedures for processing cellular applications," including a restriction permitting applicants to proffer only minor technical amendments for good cause.[1] 89 F.C.C.2d at 90-91.

Faced with more applications than expected in the top markets and a large processing backlog, the Commission decided to award cellular licenses by lottery after the top-30 markets.[2] The Commission initially emphasized, however, that applications:

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[1] After receiving 194 applications for the top 30 cellular markets, the Commission received nearly 250 amendments to those applications. *Order*, 52 Rad. Reg. 2d (P&F) 401, 402 (1982). These amendments had "a severe disruptive effect on the orderly processing of cellular applications," and the Commission explicitly prohibited the filing of any additional amendments until the publication of a hearing designation order. *Id.* at 402.

[2] *Selection from Among Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 F.C.C.2d 175, 221-22 (1984) (*"Cellular Lottery Rulemaking"*),

> will have to be acceptable for filing under our cellular rules. The staff will carefully pre-screen the cellular applications to ensure that deficient applications are not considered in the lottery. We have in the past returned cellular applications that were unacceptable and we intend in the future to continue this practice.

Cellular Lottery Rule Making, 98 F.C.C.2d at 185 (footnotes omitted). Pre-screening the cellular applications to determine their compliance with all of the FCC's rules, however, overwhelmed the FCC staff and added to the delays in processing cellular applications.

When faced with even larger numbers of applications filed for the lotteries, the Commission abandoned detailed pre-screening of applications. *Cellular Lottery Further Recon.*, 59 Rad. Reg. 2d (P&F) at 409-10. Under the revised processing system, applications with a proper certification that contained certain minimal information were included in the lottery.[3] Following the lottery, only the winning application was reviewed by the staff to determine whether it met all of the FCC's rules and thus was acceptable for filing. *Id.* at 410. Minor amendments were authorized for the winning applicant only after the Commission staff determined that the application complied steadfastly with all of the FCC's rules and designated the applicant a tentative selectee. *Id.* These same streamlined filing and processing requirements were applied to MSA and RSA applications. *Rules for Rural Cellular Service*, 60 Rad. Reg. 2d (P&F) 1029, 1035

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recon., 58 Rad. Reg. 2d (P&F) 677 ("*Cellular Lottery Recon.*"), *further recon.*, 59 Rad. Reg. 2d (P&F) 407 (1985) ("*Cellular Lottery Further Recon.*").

[3] The Commission adopted a "letter perfect" standard that required applications to contain a limited amount of precise information that identified the applicant and the market for which an authorization was sought; applications not containing this information were returned. *Cellular Lottery Recon.*, 58 Rad. Reg. 2d (P&F) at 696.

(1986). Specifically, the Commission permitted no amendments prior to the lottery and only minor amendments by the tentative selectee after the lottery. All applicants were prohibited from filing proposals that did not comply with the FCC's rules. Thus, applicants could not reasonably expect to amend applications to bring them into compliance with the rules, either before or after the lottery. *Cellular Lottery Further Recon.*, 59 Rad. Reg. 2d (P&F) at 410 n.17.

Petitioners' Procedural History. 1. Petitioners each filed applications for cellular authorizations with the FCC. Each of the petitioners certified in its applications that it complied with the alien ownership restrictions of Section 310(b) of the Act and Section 22.4(b) of the FCC's rules, 47 C.F.R. § 22.4(b). The applications of petitioners were selected in the lotteries for various RSA markets. Petitioners had filed as general partnerships and each general partnership had at least one alien general partner. Petitioners sought to file curative amendments following the lottery to change their ownership structures to limited partnerships or otherwise to remove their alien general partners.

Petitioners' applications were dismissed by the FCC's staff as unacceptable for filing because it proposed alien ownership that violated Section 310(b)(3) of the Act and Section 22.4(b)(3) of the FCC's rules. The Commission upheld the dismissal of petitioners' applications as unacceptable for filing pursuant to 47 C.F.R. § 22.20(a)(2) because that Section required that RSA cellular applications be filed in full compliance with all of the Commission's substantive rules, including the rules governing alien ownership. Pet. App. 22a. Consistent with its interpretation of Section 310(b) in *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986), the Commission held that the inclusion of aliens as general partners in petitioners' ownership structures

was not permissible. The Commission declined to accept petitioners' amendments offered to cure the violation, holding that its rules for processing cellular applications prevented the filing of amendments to cure non-compliant RSA applications. Pet. App. 23a.

The Commission also rejected petitioners' contentions that the dismissal of their applications violated the equal protection component of the Due Process Clause of the Fifth Amendment. The Commission found that distinctions based on alienage in federal statutes are permissible provided that the statute is not "wholly irrational" in meeting a legitimate government purpose. Pet. App. 28a (citing *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976)). Section 310(b) of the Act, the Commission concluded, was a permissible means of meeting Congress' intent to protect the security of domestic airwaves in the event of war. Pet. App. 28a.

2. The court of appeals unanimously denied a petition for review. The D.C. Circuit held that the Commission "was well within its authority to dismiss the applications." Pet. App. 13a. The court first held that the rules prohibiting certain levels of alien ownership in FCC authorizations were constitutional. Pet. App. 7a-10a. It then found that the FCC had properly interpreted its procedural rules in dismissing petitioners' defective applications. Pet. App. 10a-12a.

REASONS FOR DENYING THE PETITION

The D.C. Circuit's decision does not present any question that warrants review by this Court. The decision is not in conflict with the decision of any other circuit court of appeals and does not establish any new principle of law. The D.C. Circuit merely upheld the FCC's interpretations of its own procedural regulations, a matter on which agencies are accorded the highest deference. These regulations present no important issue of federal law, nor will these issues recur, because Congress and the Commission have promulgated new laws to govern the award of licenses for commercial mobile telephone service in the future by auction. Finally, the constitutional issue presented has been decided previously by this Court and the decision below is nothing more than a faithful application of those principles to petitioners' situation.

I. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION PROPERLY UPHELD THE FCC'S INTERPRETATION OF ITS OWN PROCEDURES AND THEREFORE PRESENTS NO IMPORTANT FEDERAL QUESTION FOR REVIEW BY THIS COURT.

A. Petitioners devote the majority of their petition to arguing that this Court should review the question whether the FCC properly followed its procedural regulations when it refused to allow petitioners to amend their defective applications. This issue is manifestly unworthy of further review. Courts accord " 'substantial deference' " to an agency when it is construing its own regulations. See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng* v. *Payne*, 479 U.S. 926, 939 (1986)); *San Luis Obispo Mothers for Peace* v. *NRC*, 789 F.2d 26, 30 (D.C. Cir.) (en banc), *cert. denied*, 479 U.S. 923 (1986).

The pertinent regulations are quite clear. If an application "does not comply with the Commission's rules, regulations, specific requirements for additional information

or other requirements," the application is "unacceptable for *filing*" and is therefore subject to dismissal at any point in the process. 47 C.F.R. § 22.20(a) (emphasis added). Furthermore, the Commission has made clear that, under 47 C.F.R. § 22.20(a), "applications are required to be acceptable for filing when tendered," and "the applicant has no right to resubmit a defective application with a curative amendment after the cutoff date for filing competing applications." *Ronald P. Trinchitella*, 4 FCC Rcd. 6360, 6361 (1989).

Petitioners' applications were "unacceptable for filing" because they did not comply with the Communications Act and the Commission's rules concerning alien ownership. Both the Act and the Commission's rules prohibit certain authorizations including cellular licenses from being issued to entities with certain levels of alien ownership. 47 U.S.C. § 310; 47 C.F.R. § 22.4(b). The Commission has held that both the Act and the rule apply with full force to partnerships, and not just to "corporations" in its narrowest sense. *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511, 514 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986) (noting that the Act itself defines "corporation" to include "any corporation, joint-stock company, or association").[4] All petitioners were partnerships that contained at least one alien as a general partner at the time of their original applications, in violation of both Section 310 of the Act and Section 22.4 as previously interpreted in *Wilner*. Therefore, all of the applications were "unacceptable" when filed and subject to dismissal under 47 C.F.R. § 22.20(a).

Nonetheless, petitioners ask this Court to review the decision below on the grounds that they had a right to file curative amendments following their selection in the lot-

[4] It is axiomatic that a partnership is a form of association. *See* Uniform Partnership Act § 6 (1914) (defining partnership as "association of two or more persons to carry on as co-owners a business for profit").

tery process pursuant to 47 C.F.R. § 22.918(b). As the court below correctly held, however, Section 22.918(b) provides no such right. The sentence on which petitioners place so much emphasis (Pet. 12) states only that "[i]nformation *required by § 1.65* shall be filed . . . within 30 days of the Public Notice announcing the lottery results for all applications to serve Rural Service Areas." 47 C.F.R. § 22.918(b) (emphasis added).

Section 1.65 has never been interpreted to allow amendments necessary to bring an applicant into statutory compliance. On the contrary, Section 1.65 merely ensures the "continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. § 1.65(a). If such information is "no longer substantially accurate and complete in all significant respects," the applicant is required to "furnish such additional or corrected information." *Id.* The Commission routinely rejects attempts to cure disqualifying defects by means of a Section 1.65 amendment. See, *e.g.*, *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd. 4293 (1988) (rejecting attempt by broadcast applicant to use § 1.65 to cure a § 310(b) defect); *Queen City Cellular Communications*, 64 Rad. Reg. 2d (P&F) 582 (Com. Carrier Bur. 1987), *aff'd*, 67 Rad. Reg. 2d (P&F) 527 (1990) (rejecting cellular applicant's attempt to use Section 1.65 to cure disqualifying defect concerning required map filings). Indeed, "acceptance of an amendment for purposes of Section 1.65 may involve no determination as to the effect to be given it for other purposes." *Public Mobile Radio Services Rules*, 95 F.C.C.2d 769, 788-89 (1983).

Petitioners in effect concede this point by arguing that "implicit in the *opportunity* to amend RSA applications pursuant to 47 C.F.R. § 1.65 and 47 C.F.R. § 22.918(b) is the *opportunity* to correct application defects through post-lottery amendment." Pet. 13. Yet, petitioners fail to explain why Section 22.918(b) does not mean simply what it says. That section offers the winning applicant

the "opportunity" to make the requisite post-lottery informational amendments; no more, no less.[5] The Commission thus correctly held that the rules afforded petitioners no opportunity to bring themselves into compliance with Section 310(b) of the Act, and the court below properly upheld the FCC's interpretation of its own procedural regulations.

B. Petitioners argue that the FCC had not given applicants adequate notice that the alien ownership requirements were part of the "acceptability for filing criteria" (see Pet. 14-20), but here again the court below correctly upheld the Commission's interpretation of the Act and precedent. Incredibly, petitioners continue to rely on *Nevada Broadcasting Group, No.* BPCT-850725KO, 1986 FCC LEXIS 3215 (Mass Media Bur. June 19, 1986), as establishing that " 'aliens are not prohibited by Section 310(b) from applying for licenses, only from "holding" them.' " See Pet. 18 & n.17 (quoting *Nevada Broadcasting Group*, at *4). In context, the FCC staff actually held the opposite: it dismissed an application with a Section 310(b) defect because it was unacceptable for filing as of the original cut-off date under the rules for processing broadcast applications.[6]

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[5] Because cellular licenses are allocated on a lottery basis, Section 22.918(b) serves the interest of administrative efficiency. In order to prevent the Commission from having to process hundreds of Section 1.65 informational amendments that may ultimately be irrelevant, Section 22.918(b) prohibits all such amendments until after the lottery determines a winner. As the Commission has stated, the rule "strictly *limit*[*s*] the filing of amendments"; it does not expand the opportunities for amendment. *Cellular Lottery Rule Making*, 98 F.C.C.2d at 220 (emphasis added).

[6] The section quoted by petitioners goes on to state:

> *Nonetheless, applicants must also comply with all relevant procedural requirements.* In this regard, to aid in the orderly processing of applications for new stations, the Commission's Rules provide that applicants, such as NBG, must be on file by a specified cut-off date. Section 73.3572(c). Unless corrected

The cellular precedent cited by petitioners (see Pet. 19-20) similarly did not create any confusion about the applicable rules. In *Advanced Business Communications, Inc.*, 2 FCC Rcd. 3751 (1986), for example, the FCC first dismissed an application for a violation of the alien ownership rules, but later reinstated the application when the applicant demonstrated that its proposal never violated those rules.[7] Similarly, in *GTRW Partnership*, 2 FCC Rcd. 4160 (1987), the FCC granted a license to an applicant whose original application did *not* disclose any alien ownership. After the lottery, the applicant had corrected the application to disclose the presence of an alien in a permissible limited role. The FCC's decision never indicated that an applicant would be permitted to file post-lottery amendments to cure a disqualifying defect.[8] See Pet. App. 26a-27a. As the D.C. Circuit found, the FCC's procedural rules "alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications." Pet. App. 12a. Because the court of appeals correctly upheld the Commission's interpretation of its own pro-

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> prior to the cut-off date, applications that are patently defective when tendered are returned and are not entitled to comparative consideration with other applications that are not defective and are substantially complete.

Nevada Broadcasting Group, at *4-5 (emphasis added). Indeed, the Commission dismissed the application because the applicant had included an alien as a general partner.

[7] The application had erroneously identified an alien as a "corporate secretary" rather than simply an office secretary. The Commission dismissed the application after the lottery, but allowed the applicant to report that the "secretary" was not an officer of the corporation.

[8] As petitioners note, the Commission has overruled *GTRW* to the extent that it suggests that applicants are permitted, post-filing, to make an alien general partner a limited partner.

cedural rules in dismissing petitioners' applications, further review by this Court is not warranted.

II. THE FEDERAL GOVERNMENT'S USE OF ALIENAGE AS A CRITERION FOR COMMON CARRIER RADIO LICENSE OWNERSHIP IS CONSTITUTIONAL.

A. Article I, Section 8, Clause 4 of the United States Constitution provides that "Congress shall have Power . . . To establish a uniform Rule of Naturalization." In *Graham* v. *Richardson,* 403 U.S. 365 (1971), this Court found that "[t]he National Government has 'broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.'" *Id.* at 377 (quoting *Takahashi* v. *Fish & Game Comm'n,* 334 U.S. 410, 419 (1948)).

Pursuant to this constitutional authorization, Congress has adopted a limitation on the ownership of radio licenses by aliens. Section 310 of the Communications Act of 1934, as amended, provides that:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation of which any officer or director is an alien . . . .

47 U.S.C. § 310(b). The statute also denies common carrier radio licenses to foreign governments, individual aliens, foreign corporations, and corporations more than one-fifth owned or controlled by foreign governments, aliens, or foreign corporations. *Id.* These provisions were adopted out of a general concern for national security; Congress legitimately feared the effect of allowing vital modes of communication to be controlled by potentially hostile aliens. See 47 U.S.C. § 151. Because this limitation was not "wholly irrational," it was properly

upheld by the court below. *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976).

In arguing that denying licenses to aliens violates equal protection, petitioners principally rely on cases construing the Equal Protection Clause of the 14th Amendment as applied to state legislation. While the Fifth Amendment's Due Process Clause does serve equal justice under law and does apply to both the federal and state governments, "the two protections are not always coextensive." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). This Court explained:

> Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Id. (footnote omitted). Petitioners ignore this fundamental distinction embodied in our constitutional plan. Because petitioners' equal protection arguments are based on a false premise, there is no reason to review that issue in this case.[9]

B. First, petitioner incorrectly argues that the Federal Communications Commission has broadly expanded the congressional policy against alien ownership of common

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[9] In *Mathews*, this Court upheld a federal statute excluding certain aliens from enrollment in a supplemental Medicare insurance program. The Court found that the Due Process Clause prohibited the federal government only from using alienage as a basis for restrictions that were "wholly irrational." 426 U.S. at 83. The Court noted that the Due Process Clause does not require the federal government to give all of the advantages of citizenship to aliens, *id.* at 78, even though state governments are often required to do so by the Equal Protection Clause:

> [I]t is not "political hypocrisy" to recognize that the Fourteenth Amendment's limits on state power are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.

Id. at 86-87.

carrier radio licenses enunciated in Section 310 of the Act, 47 U.S.C. § 310(b). Pet. 21 & n.21. As explained previously, the FCC merely implemented Congress' manifest purpose. See *supra*, p. 7 & note 4. It would be plainly inconsistent with Congress' decision to impose restrictions on alien ownership of radio licenses to allow aliens to gain ownership or control of these restricted licenses merely by altering the organizational form of their businesses.

Second, petitioner argues that the Commission has expanded congressional prohibitions on alien ownership of common carrier radio licenses by determining incorrectly that partners in a partnership hold powers that are comparable to those exercised by officers and directors in a corporation. See *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511, 520 n.43 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986). However, it is equally axiomatic that partners in a partnership, like corporate officers and directors, both manage the business' day-to-day affairs and bind the entire partnership in relation to the outside world. See Uniform Partnership Act § 9 (1914). The applicability of Section 310 cannot be so narrowly confined to a particular form of business governance that would completely thwart the substance of the statutory restriction.

Finally, petitioners argue that under *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), deference should not be accorded to the FCC's limitations on alien ownership because the Commission is "an independent regulatory agency" and not a political branch of the federal government.[10] Pet. 22. Petitioners misconstrue *Hampton*. In

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[10] Petitioners' semantics should not confuse the Court. The term "independent agency" signifies administrative independence only insofar as the agency is in some manner insulated from direct control. 1 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 4.04 (1993). The FCC, however, is not insulated from politics. The FCC Commissioners are appointed by the President, subject

Hampton, this Court, applying "some judicial scrutiny," found a Civil Service Commission ("CSC") regulation based on alienage invalid under the Due Process Clause. 426 U.S. at 103. Congress gave the CSC the task of overseeing the federal civil service. However, on the CSC's own initiative, the agency decided to deny civil service appointments to aliens. In reviewing this regulation, the Court found that it was "appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission." *Id.* at 105. Even so, strict scrutiny was not applied. In invalidating the agency regulations, this Court found that the CSC's alienage restriction was "far removed from [its] normal responsibilities," *id.*, and had not emanated from Congress or the President, *id.* at 116.

In the present case, by contrast, Congress itself is the source of the limitation imposed on aliens. 47 U.S.C. § 310(b). Furthermore, Congress has delegated to the FCC the authority to make the rules and regulations necessary to enforce the provisions Congress enacted. 47 U.S.C. § 151. Therefore, the policy protected by the Commission's refusal to grant licenses to partnerships with alien partners emanates from Congress and is a legitimate restriction on aliens residing in this country at the pleasure of Congress. Therefore, the court of appeals correctly declined to do more than determine that the limitation on alien ownership of common carrier radio licenses was rational.

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to the advice and consent of the Senate, and charged with enforcing the Communications Act on behalf of Congress. *Id.* § 4.04[2][b]; 47 U.S.C. § 154(a). For a recent example of this Court's recognition of an independent agency exercising authority of a "significantly political nature," *see Mistretta* v. *United States*, 488 U.S. 361, 393 (1989).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

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REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

Petitioners, by their undersigned counsel and pursuant to Rule 15.6 of this Court, hereby reply to the brief in opposition ("Resp. Br.") filed in this proceeding on behalf of the Federal Communications Commission ("Respondent" or "FCC"), and to the brief in opposition ("Int. Br.") filed in this proceeding on behalf of certain private respondents ("Intervenors").

ARGUMENT

A. Respondent, relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), attempts to defend the Court of Appeals utilization of a "reasonable interpretation" standard when reviewing the FCC's expansion of the statutory restrictions on alien participation in radio licenses. Resp. Br. 6, n.2. In so contending, Respondent, like the Court

of Appeals, ignores the inherent conflict between the deference to agency interpretations seemingly mandated by *Chevron,* and this Court's consistent requirement that a court review an agency's differential treatment of a "suspect class", such as resident aliens, under a strict scrutiny standard. *Plyler v. Doe,* 457 U.S. 202 (1982); *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); *Mathews v. Diaz,* 426 U.S. 67 (1976).

The appropriate standard of review is not an inconsequential matter. Seldom will an agency's interpertation or expansion of a statute be overturned when it is afforded the deference called for by *Chevron.* By contrast, "only rarely" will agency actions adversely impacting a suspect class survive examination under the strict scrutiny standard. *Bernal v. Fainter,* 467 U.S. 216, 219, n.6 (1984).

Petitioners submit that, when an agency's statutory interpretation has constitutional implications relating to a suspect class, a reviewing court cannot abdicate its obligation to strictly scrutinize that interpretation. *Chevron* cannot justify blind deference to an agency's expertise when the agency's statutory interpretation may be constitutionally defective.

Petitioners respectfully suggest that this Court afford itself the opportunity of this case to explore and resolve the conflict between the two inconsistent standards of review presented herein, which conflict, absent resolution by this Court, will continue to arise whenever an agency interprets or expands a statutory provision in a manner adverse or detrimental to the interests of the members of a suspect class.

B. Respondent attempts to preclude any consideration by this Court of the effect of the FCC's RSA specific modification to 47 C.F.R. § 22.918(b), the regulatory provision governing the amendment of cellular applications. Resp. Br. 8, n.4. Respondent contends that Petitioners failed to raise the RSA specific provision of 47

C.F.R. § 22.918(b) either before the FCC or prior to the Court of Appeals' initial decision.

Any fair review of the record in this proceeding clearly establishes that Petitioners have relied upon the RSA specific provision of 47 C.F.R. § 22.918(b) from the earliest stages. Petitioners, citing 47 C.F.R. § 22.918(b), timely submitted amendments to their subject applications. The FCC, in affirming its staff's dismissal of the subject applications, attempted to ignore the RSA specific provision of 47 C.F.R. § 22.918(b). Pet. App. 22a-23a. Petitioners, in their initial brief to the Court of Appeals, reiterated their reliance upon the RSA specific provision of 47 C.F.R. § 22.918(b). When Respondent and Intervenors, in their respective briefs to the Court of Appeals, attempted to hold Petitioners to the MSA standards of 47 C.F.R. § 22.918(b), Petitioners utilized their reply brief to discuss the RSA specific amendment to that regulation.

In any event, the Court of Appeals clearly considered the issue of RSA applicants' "opportunity to file amendments," even though it wrongly applied the MSA standard rather than the RSA standard. Pet. App. 4a. The Court of Appeals having cited "opportunity to file amendments" as a significant factor in its decision, Pet. App. 4a, Respondent cannot now claim that this issue is not properly before this Court.

C. Respondent contends that its RSA specific modification of 47 C.F.R. § 22.918(b) did not provide an "opportunity" for the curative amendment of RSA applications. Resp. Br. 8-9. In support of this contention, Petitioner tells the Court that the FCC "did not *purport* to change its absolute prohibition on the use of amendments to cure disqualifying defects in applications as originally filed," Resp. Br. 4, n.1 (emphasis added); "did not *purport* to alter the rule that an applicant that is unqualified at the time its application is submitted may not cure the defect through a subsequent amendment," Resp.

Br. 9 (emphasis added); and "did not *suggest* that [its] minor change in Rule 22.918(b) would signal any retreat from the prohibition against the use of amendments to cure disqualifying defects," Resp. Br. 9 (emphasis added).

In rebuttal, Petitioners are constrained to point out that nothing in the RSA specific provision of 47 C.F.R. § 22.918(b), or in the language of the order adopting that provision, *purported* or *suggested* any prohibition or limitation on the use of the clear and specific RSA post-lottery amendment opportunity to cure defects in RSA applications. Having failed to provide any such prior notice of intended restrictions on the use of the RSA specific amendment opportunity, Respondent now cannot claim that RSA applicants were barred from using that amendment opportunity to cure application defects.[1]

Respondent's arguments reveal that the FCC's RSA specific modification of 47 C.F.R. § 22.918(b) had an effect unintended, and in fact probably unanticipated, by the agency; the provision of an opportunity to amend an RSA application after its selection by lottery, but prior to its being subjected to extensive staff screening. The issue, however, is not what the FCC intended by its modification of 47 C.F.R. § 22.918(b), but rather the actual effect of that modification.

The Court of Appeals erred in affirming the FCC's rejection of Petitioners' curative amendments without giving due consideration to the RSA specific amendment

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[1] Prior to the RSA application proceedings, a cellular applicant was unable to cure qualifying defects in its application as originally filed only because 47 C.F.R. § 22.918(b) did not provide MSA applicants with an "opportunity" for amendment prior to their applications being subjected to extensive screening by the FCC's staff. *Amendment of the Commission's Rules to Allow the Selection From Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 59 Rad. Reg.2d (P&F) 407, 410, n.17 (1985).

provision of 47 C.F.R. § 22.918(b).[2] In doing so, the Court of Appeals could not properly consider what result the FCC *intended* by its RSA specific modification of 47 C.F.R. § 22.918(b).[3] Instead, the Court of Appeals should have considered the actual effect of the RSA specific amendment provision of 47 C.F.R. § 22.918(b). It now is incumbent upon this Court to vindicate Petitioners' due process right to have been provided with clear prior notice of the standards and procedures against which the FCC would evaluate Petitioners' applications.

D. Intervenors imply that amendments filed pursuant to 47 C.F.R. § 1.65 may not be used "to bring an applicant into statutory compliance." Int. Br. 8.[4] In support of that position, Intervenors claim that "the Commission routinely rejects attempts to cure disqualifying defects by a Section 1.65 amendment." Int. Br. 8.[5] Examination of Intervenors' authorities, however, reveals a fatal misapprehension undermining Intervenors' assertions.

Upon examination of *PrimeMedia*, it becomes clear that the FCC's rejection of that applicant's amendments was not occasioned by their character as 47 C.F.R. § 1.65 amendments, but because the applicant attempted to file

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[2] As noted above, the Court of Appeals specifically relied upon its determination that Petitioners had "no opportunity to file" curative amendments. Pet. App. 4a.

[3] "It is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express." *McElroy Electronics Corporation v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (citations omitted).

[4] 47 C.F.R. § 22.918(b) allows an RSA applicant to file 47 C.F.R. § 1.65 amendments within thirty (30) days after the announcement of the selection of its application by lottery.

[5] Citing *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd. 4293 (1988) (*"PrimeMedia"*); *Queen City Cellular Communications*, 64 Rad. Reg.2d (P&F) 582 (Comm. Carrier Bur. 1987), *aff'd*, 67 Rad. Reg.2d (P&F) 527 (1990) (*"Queen City"*); *Nevada Broadcasting Group*, No. BPCT-850725KQ, 1986 FCC Lexis 3215 (Mass Media Bur. June 19, 1986) (*"Nevada Broadcasting"*).

curative amendments after the expiration of the limited time period specified for the filing of such amendments. What the FCC held therein was that an amendment's 47 C.F.R. § 1.65 character could not be used to expand an amendment filing window. There was no implication in the *PrimeMedia* ruling that a 47 C.F.R. § 1.65 amendment could not also be a "curative" amendment. In *Queen City*, the FCC refused to allow a 47 C.F.R. § 1.65 amendment to be used to provide belatedly a required original component of an MSA application. It was not the amendment's 47 C.F.R. § 1.65 character which precluded its acceptance by the FCC. Instead, the amendment was rejected as an attempt to provide a required component out of time. *Queen City*, like *Prime Media*, contained no implication that a 47 C.F.R. § 1.65 amendment could not also be a "curative" amendment. In *Nevada Broadcasting*, the FCC refused to consider curative amendments to applications involving alien ownership. That case makes clear, however, that the rejection of those amendments was occasioned by their tender after the closing of the specified windows of opportunity for amendments in those proceedings. As in *PrimeMedia* and *Queen City*, there is no implication in *Nevada Broadcasting* that a 47 C.F.R. § 1.65 amendment could not be used to effectuate a cure of a disqualifying defect.[6]

In contrast with the *PrimeMedia*, *Queen City* and *Nevada Broadcasting* amendments' lack of timeliness, Petitioners' amendments were timely filed within the period specified by 47 C.F.R. § 22.918(b) for post-lottery amendments of RSA applications. As timely, un-

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[6] Contrary to Intervenors assertion, Int. Br. 9, *Nevada Broadcasting* clearly states and stands for the proposition that "aliens are not prohibited by Section 310(b) from applying for licenses, only from 'holding' them." 1986 Lexis 3215 at *4. That the *Nevada Broadcasting* applications were ultimately dismissed for failure to cure citizenship defects by timely amendment does not diminish the fact that unqualified aliens were able to participate in the filing of an application.

restricted amendments, they should have been given full effect and consideration by both the FCC and the Court of Appeals.

Intervenors citation of *Public Mobile Radio Services Rules*, 95 F.C.C.2d 769, 788-89 (1983), Int. Br. 8, is simply a red herring. That case stands for nothing more than the proposition that where an FCC regulation places a specific restriction on the use of a 47 C.F.R. § 1.65 amendment, such an amendment has no effect other than to update or correct application information. As pointed out above, however, nothing in 47 C.F.R. § 22.918(b), or in the language adopting the RSA provision of that regulation, gave any notice that the FCC intended to restrict the use or effect of a 47 C.F.R. § 1.65 amendment timely filed pursuant thereto.

E. Respondent and Intervenors both assert that this case does not warrant review by this Court. Resp. Br. 6 and Int. Br. 6. It is clear, however, that this case presents a conflict between two fundamental legal principles. On one hand is the deference mandate of *Chevron*, while on the other is the requirement that differential treatment of suspect classes be subjected to strict scrutiny by reviewing courts. Standing alone, this conflict, which can be resolved only by this Court, provides a compelling basis for review.

CONCLUSION

In consideration of the foregoing, and in consideration of the arguments set forth in the initiating Petition, a writ of certiorari should issue.

Respectfully submitted,

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